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SUPREME COURT OF THE UNITED STATES.

No. 91.

RANSOM GARDNER, GEORGE GOSS, AND MOSES M. JACKMAN, PL'FFS IN ER.,

vs.

WILLIAM S. MOSS, SMITH FRYE, AND CHARLES GREENLEAF.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE NORTHERN DIST. OF ILLINOIS.

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UNITED STATES OF AMERICA,
Supreme Court, December Term, A. D. 1856.

GARDNER et al.
vs.
Moss, FRYE and al.

Error to circuit for Nothern District of Illinois.

And now comes said plaintiffs in error, by Wm. H. Seward, their attorney, and say that there is manifest error in the judgment and proceedings aforesaid, upon the face of the record thereof, on account of which the same ought to be reversed and for naught held, and for a specification of said errors show to the court the following:

1st. The circuit court erred in admitting improper testimony to be given by the plaintiffs in that court.

2d. The court erred in excluding competent testimony offered by the defendants in the circuit court.

3d. The circuit court erred in giving construction to the several contracts read in evidence.

4th. The court erred in refusing to direct the jury to find as in case of non-suit.

5th. The court erred in instructing the jury as to the law of the case.

6th. The court erred in refusing to grant a new trial.

7th. The court erred in rendering judgment in favor of defendants in error.

8th. The court erred in not rendering judgment for plaintiffs in error.

And for these and other manifest errors the said plaintiffs in error ask that said judgment and proceedings may be set aside, reversed and for naught held, and that they may have judgment for their costs, &c.

WILLIAM H. SEWARD,
Attorney and of Counsel for Plaintiffs in Error.

UNITED STATES OF AMERICA,
Seventh circuit and northern district of Illinois.

Pleas in the circuit court of the United States, for the northern district of Illinois, held at the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, judge of the district court of the United States, for said northern district of Illinois; presiding, in the absence of the Hon. John McLean, one of the Justices of the Supreme Court of the United States, and judge of said seventh circuit, on the third day of June, in the year of our Lord, one thousand eight hundred and fifty-six, and of our independence the eightieth year.

WILLIAM S. MOSS, SMITH FRYE AND CHARLES GREENLEAF
vs.
RAMSON GARDNER, GEORGE GOSS AND MOSES M. JACKMAN.
} In Attachment.

Be it remembered, that heretofore, to wit, on the 11th day of December, A. D. 1854, the defendants in the foregoing entitled cause, filed in the office of the clerk of the circuit court of the United States, for the late district of Illinois, the transcript from the records of the circuit court of Peoria county, and State of Illinois, in the words and figures following, to wit:

STATE OF ILLINOIS,
Peoria county, ss.

Be it remembered, that heretofore, to wit, on the seventeenth day of August, in the year of our Lord, one thousand eight hundred and fifty-four, there was filed in the office of the clerk of the circuit court, in and for the county of Peoria, in the State of Illinois, an affidavit and precipes in the words and figures following, to wit:

Affidavit.

STATE OF ILLINOIS,
Peoria county, ss.

Smith Frye, being duly sworn according to law, says, that Ransom Gardner, George Goss, and Moses M. Jackman, composing the firm of Goss, Jackman & Co., railroad contractors on the Peoria and Burean Valley Railroad, are justly indebted to William S. Moss, Smith Frye and Charles Greenleaf, of the county of Peoria, and State of Illinois, in the sum of twenty-six thousand five hundred and fifty-five dollars and fifty-three cents, ($26,555.53,) as near as he can now ascertain, the same being for work done and performed in grading, grubbing and clearing, on sections one, two, three, four, five, six, seven, eight, nine and ten, and for lumber, timber, ties and materials furnished and delivered for the construction of the said several sections aforesaid, of the Peoria and Burean Valley Railroad, in the county of Peoria, and State of Illinois, and that the said Ransom Gardner, George Goss, and Moses M. Jackman, are, as this affiant is informed and believes, non-residents of the State of Illinois; and further saith not.

SMITH FRYE.

Subscribed and sworn to before me this 17th August, 1854.
N. H. PENPLE,
Notary Public, Peoria C'ty, Illinois.

Precipes.

WILLIAM S. MOSS, SMITH FRYE,
CHARLES GREENLEAF
vs.
RANSOM GARDNER, GEORGE GOSS,
MOSES M. JACKMAN.

In the Circuit Court of Peoria county, September Term, 1854.

Issue attachment in this cause to the Sheriff of Peoria county, pursuant to the foregoing affidavit, returnable according to law.

MANNING & JOHNSON,
PENPLE & SANGER,
Pl'ffs Att'ys.

August 17, 1854.

Issue attachment also in the above entitled cause to the Sheriff of Cook county, with directions to summon Henry Farnham.

Shiffield, and the Bank of America, as garnishees, returnable to next term pursuant to the foregoing affidavit.

August 17, 1854.

MANNING & JOHNSON,
PENPLE & SANGER, for
Pl'ffs.

JACOB GALE, Esq., *Clerk.*

And on the same day, there was also filed in said clerk's office an attachment bond, which was approved by the clerk of said court, and is in the words and figures following, to wit:

Know all men by these presents, that we, William S. Moss, Smith Frye, Charles Greenleaf, Peter Sweat, Charles S. Clark, James Daugherty, are indebted unto Ransom Gardner, George Goss, and Moses M. Jackman, in the sum of fifty-three thousand one hundred eleven 6-100 dollars, for the payment whereof we hereby firmly bind ourselves. Given under our hands and seals this 17th day of August, in the year of our Lord one thousand eight hundred and fifty-four.

The condition of the above obligation is such, that whereas the above bounden Moss, Frye, and Greenleaf have, on the day of the date hereof, prayed an attachment at the suit of themselves against the estate of the above named Ransom Gardner, George Goss, and Moses M. Jackman for the sum of twenty-six thousand five hundred fifty-five dollars and 53 cents, and the same being about to be sued out, returnable on the 2nd Monday of September next, to the term of the circuit court of Peoria county then to be holden.

Now, if the said Moss, Frye, and Greenleaf shall prosecute their said suit with effect, or in case of failure therein shall well and truly pay and satisfy the said Gardner, Goss, and Jackman, all such costs in said suit, and such damages as shall be awarded against the said Moss, Frye, and Greenleaf, their heirs, executors, or administrators in any suit or suits which may hereafter be brought for wrongfully serving out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

WM. S. MOSS, [SEAL.]
PETER SWEAT, [SEAL.]
SMITH FRYE, [SEAL.]
C. S. CLARK, [SEAL.]
CHARLES GREENLEAF, [SEAL.]
JAMES DAUGHERTY, [SEAL.]

Whereupon, on the same 17th day of August, A. D. 1854, the clerk of said court issued under the seal of said court a writ of attachment, in the words and figures following, to wit:

Writ to Peoria county.

The people of the State of Illinois to the sheriff of Peoria county, greeting:

Whereas Smith Frye, on behalf of himself and William S. Moss and Charles Greenleaf, has complained on oath to the clerk of the circuit court of the said county of Peoria, that Ransom Gardner, George Goss, and Moses M. Jackman, composing the firm of Goss, Jackman, & Co., are justly indebted to them in the sum of twenty-six thousand five hundred and fifty-five dollars and fifty-three cents; and oath having been also made that the said Ransom Gardner, George Goss, and Moses M. Jackman, are, as the affiant, said Smith Frye, is informed and believes, non-residents of the State of Illinois, and the said William S. Moss, Smith Frye, and Charles Greenleaf having given bond and security according to the directions of the act in such case made and provided, we, therefore, command you that you attach so much of the estate, real or personal, of the said Ransom Gardner, George Goss, and Moses M. Jackman, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint, and such estate so attached, in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law, at the term of the said circuit court to be held at Peoria, in and for the said county of Peoria, on the second Monday of September next, so as to compel the said Ransom Gardner, George Goss, and Moses M. Jackman to appear and answer the complaint of the said Wm.

S. Moss, Smith Frye, and Charles Greenleaf, when and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness Jacob Gale, clerk of our said court, and the seal thereof, at Peoria, this seventeenth day of August, in [L. S.] the year of our Lord one thousand eight hundred and fifty-four.

JACOB GALE, *Clerk.*

Upon which said writ Leonard B. Comwell, the sheriff of said Peoria county, afterwards, on the 11th day of September, A. D. 1851, made the following return, to wit:

The within named defendants are not found in , and I do not know of any property in my county belonging to them, or either of them, in my county.

September 11th, 1854.

L. B. COMWELL,
Sheriff P. C.

And on the same 17th day of August, A. D. 1854, the clerk of said court issued under the seal of said court another writ of attachment in said cause to the sheriff of Cook county, which is in the words and figures following, to wit:

Writ to Cook county.

The people of the State of Illinois to the sheriff of Cook county, greeting:

Whereas Smith Frye, on behalf of himself and William S. Moss and Charles Greenleaf, has complained on oath to the clerk of the circuit court of the said county of Peoria, that Ransom Gardner, George Goss, and Moses M. Jackman, composing the firm of Goss, Jackman, & Co., are justly indebted to them in the sum of twenty-six thousand five hundred and fifty-five dollars and fifty-three cents; and oath having been also made that the said Ransom Gardner, George Goss, and Moses M. Jackman are, as the affiant, said Smith Frye, is informed and believes, non-residents of the State of Illinois; and the said William S. Moss, Smith Frye, and Charles Greenleaf having given bond and security, according to the directions of the act in such case made and provided, we, therefore, command you that you attach so much of the estate, real or personal, of the said Ransom Gardner, George Goss, and Moses M. Jackman, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint, and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at the term of the said

circuit court to be held at Peoria, in and for the said county of Peoria, on the second Monday of September next, so as to compel the said Ransom Gardner, George Goss, and Moses M. Jackman to appear and answer the complaint of the said Wm. S. Moss, Smith Frye, and Charles Greenleaf; and that you also summons Henry Farnham, Shiffield, and the Bank of America, as garnishees, to be and appear at the said court on the said second Monday of September next, then and there to answer to what may be objected against them, when and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness Jacob Gale, clerk of our said court, and the seal thereof, at Peoria, this seventeenth day of August, in [L. S.] the year of our Lord one thousand eight hundred and fifty-four.

JACOB GALE, *Clerk.*

Upon which last mentioned writ, the sheriff of said Cook county made the following return, as the same remains endorsed thereon, to wit:

No property found in my county to attach; served by reading to Charles B. Farwell, president pro tem. of the within named Bank of America, as garnishee, and delivered him a copy of this writ. The president of said bank not found in my county. August 24, 1854, the within named Henry Farnam and Shiffield not found in my county.

C. P. BEADLEY,
Sheriff Cook county, by J. N. Norton, Dept.

And afterwards, on the eighteenth day of August, A. D. 1854, there was filed in said cause in the circuit court of Peoria county, a declaration and copy of claims disclosed on, in the words and figures following:

Declaration.

STATE OF ILLINOIS,
Peoria county, ss.

In the circuit court of Peoria county, September Term, 1854.

William S. Moss, Smith Frye, and Charles Greenleaf, plaintiffs in this suit, complain of Ransom Gardner, George Goss, and Moses M. Jackman, of a plea that the said defendants render to the said plaintiffs the sum of forty thousand dollars, lawful money of the United States, which they owe to, and unjustly detain from the said plaintiffs.

For that whereas the said defendants heretofore, to wit, on the seventeenth day of August, A. D. 1854, at the county of Peoria aforesaid, were indebted to the said plaintiffs in the sum

of forty thousand dollars for work and labor upon the Peoria and Burean Valley Railroad, at the request of the said defendants done and performed; and also in the further sum of forty thousand dollars for timber, lumber, and ties, by the said plaintiffs, before that time, sold and delivered to defendants; and also in the further sum of forty thousand dollars for grubbing and clearing by said plaintiffs, at the request of the said defendants before that time done and performed on the said Peoria and Burean Valley Railroad; and also in the further sum of forty thousand dollars for extra work by the said plaintiffs at the request of the said defendants done and performed on the said Peoria and Burean Valley Railroad before that time, and being so indebted, the said defendants then and there afterwards, to wit, on the day and year and at the county aforesaid, became liable and agreed to pay the same upon request, yet the said defendants, though requested, hath not paid the same nor any part thereof, but has refused, and still refuses, to the damage of the said plaintiffs forty thousand dollars, and therefore they bring suit, &c.

MANNING & JOHNSON,
PENPLE & SANGER,
Pl'ffs Att'ys.

Claims declared on.

Copy of claims declared on in this suit.

RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN,
To WM. S. MOSS, SMITH FRYE, CHARLES GREENLEAF, DR.

To work and labor done on Peoria and Burean Valley Railroad, per agreement.....	$40,000 00
To timber, lumber, and ties sold and delivered by plaintiffs to deff'ts.....	40,000 00
To extra work on Peoria and Burean Valley Railroad done by pl'ffs for def'ts.....	40,000 00

And afterwards, on the eleventh day of September, A. D. 1854, there was filed in said cause an affidavit, in the words and figures following, to wit:

Farwell's affidavit.

STATE OF ILLINOIS,
Peoria county, ss.

SMITH FRYE, WILLIAM S. MOSS,
vs.
RANSOM GARDNER, GEORGE GOSS,
MOSES M. JACKMAN.
} Attachment.

Circuit court, Peoria county.

The Bank of America having been garnisheed in the above entitled cause, Charles B. Farwell, president of the Bank of

America pro tem., upon whom the garnishee process was served, deposes that at the time of the service of said garnishee process, nor since he has been president pro tem. of said Bank of America, has their been any funds of the defendants, or any or either of them, in said bank. Further saith not.

C. B. FARWELL.

Subscribed and sworn to before me this seventh day of September, A. D. 1854.

L. D. HOARD, [L. S.]
Clk. Cir. Court.

And afterwards, on the tenth day of October, A. D. 1854, the clerk of said court issued in said cause another writ of attachment to the sheriff of Peoria county, in the words and figures following, to wit:

Alias writ to Peoria co.

The people of the State of Illinois to the sheriff of Peoria county, greeting:

Whereas Smith Frye, on behalf of himself and William S. Moss and Charles Greenleaf, has complained on oath to the clerk of the circuit court of the said county of Peoria, that Ransom Gardner, George Goss, and Moses M. Jackman, composing the firm of Goss, Jackman, & Co., are justly indebted to them in the sum of twenty-six thousand and five hundred and fifty-five dollars and fifty-three cents; and oath having been also made that the said Ransom Gardner, George Goss, and Moses M. Jackman are, as the affiant, said Smith Frye, is informed and believes, non-residents of the State of Illinois; and the said William S. Moss, Smith Frye, and Charles Greenleaf having given bond and security according to the directions of the act in such case made and provided, we, therefore, command you that you attach so much of the estate, real or personal, of the said Ransom Gardner, George Goss, and Moses M. Jackman to be found in your county as shall be of value sufficient to satisfy the said debt and costs, according to the complaint; and such estate so attached in your hands to, or so to provide that the same may be liable to further proceedings thereupon, according to law, at the term of the said circuit court, to be held at Peoria, in and for the said county of Peoria, on the third Monday of November next, so as to compel the said Ransom Gardner, George Goss, and Moses M. Jackman to appear and answer the complaint of the said William S. Moss, Smith Frye, and Charles Greenleaf. And that you also summon Henry Farnham, as garnishee, to be and appear at the said court on the said third Monday of November next, then and there to

answer to what may be objected against him, when and where you shall make known to the said court how you have executed this writ, and have you then there this writ.

Witness Jacob Gale, clerk of our said court, and the seal thereof, at Peoria, this tenth day of October, in the [L. S.] year of our Lord one thousand eight hundred and fifty-four.

JACOB GALE, *Clerk.*

Upon which last mentioned writ the sheriff of said Peoria county made the following return, endorsed thereon, to wit:

I served the within writ by reading to Moses M. Jackman, November 6th, 1854, also by reading to the within-named Henry Farnham, as garnishee, November 8th, 1854, at 7 o'clock, A. M.

L. B. COMWELL, *Sheriff P. C.*

I further return that Gardner, Goss, and Jackman have not property in my county within my knowledge.

L. B. COMWELL, *Sheriff P. C., Ill's.*

November 14th, 1854.

And afterwards, to wit, on the 27th day of November, A. D. 1854, the defendants filed their petition to remove this cause into the circuit court of the United States, as follows, to wit:

Petition bounty.

To the Hon. Onslow Petus, Judge of the Circuit Court of Peoria, State of Illinois:

The petition of Ransom Gardner, George Goss, and Moses M. Jackman, composing the firm of Goss, Jackman & Co., respectfully represent, that on seventeenth day of August, A. D. 1854, a writ of attachment was issued out of the clerk's office of the circuit court of Peoria county, State of Illinois, against the goods and chattels, rights and credits, of your petitioners, at the suit of William S. Moss, Smith Frye, and Charles Greenleaf, which writ of attachment was directed to the Sheriff of Peoria county to execute; and also another writ in the same cause was directed to the Sheriff of Cook county, to summons Henry Farnham, Sheffield, and the Bank of America, as garnishees of petitioners; which writs were made returnable at the September term of the said circuit court, A. D. 1854, to recover a plea of trespass, on the case upon promises, the sum of twenty-six thousand five hundred and fifty-five dollars and fifty-three cents, as by the affidavit filed in said court will more fully appear.

And your petitioners further represent, that, at the time of

the issuing and service of the said writ or writs of attachment in said suit, your petitioners, that is to say, the said Ransom Gardner was and still is a citizen of the State of Michigan, the said George Goss was and still is a citizen of the State of Delaware, and the said Moses M. Jackman was and still is a citizen of the State of Massachusetts; and that the said William S. Moss, Smith Frye, and Charles Greenleaf, at the time of the issuing and service of said writs of attachment, and still are citizens of the said State of Illinois, and that the matter in dispute in said suit, between your petitioners and the said William S. Moss, Smith Frye, and Charles Greenleaf, exceeds in amount and value the sum of five hundred dollars, exclusive of costs.

Your petitioners, therefore, pray that the said suit may be removed for trial into the next circuit court of the United States, within and for the district of Illinois, according to the act of Congess in each case made and provided; and your petitioners now offer Nathaniel B. Courtiss, as their sureties for entering in said circuit court of the United States, for the district of Illinois, on the first day of its next session, copies of the processes against them, and also for their appearance in said court, according to the provisions of said act of Congress.

RANSOM GARDNER,
M. M. JACKMAN,
GEORGE GOSS.

STATE OF ILLINOIS,
Peoria County, ss.

This day personally appeared before me, the undersigned, clerk of the circuit court of said county, Moses M. Jackman, who, being duly sworn, deposes and says, that all the several matters and things stated and set forth in the foregoing petition are true, in substance and in fact, and further saith not.

MOSES M. JACKMAN.

Subscribed and sworn to before me this 21st day of November, A. D. 1854.

JACOB GALE, *Clerk.*

On the same twenty-seventh day of November, A. D. 1854, the defendants filed in this cause a bond, with N. B. Curtiss as surety, for the removal of this cause into the circuit court of the United States, for the district of Illinois, which is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Ransom Gardner, George Goss, Moses M. Jackman, and , are held and firmly bound unto William S. Moss, Smith Fry, and Charles Green-

leaf, in the penal sum of five hundred dollars, to the payment of which well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

Witness our hands and seals this twenty-seventh day of November, A. D. 1854.

The condition of the above obligation is such, that, whereas the said Ransom Gardner, George Goss, and Moses M. Jackman have this day applied to the circuit court of Peoria county, State of Illinois, to remove into the circuit court of the United States, for the district of Illinois, a certain suit now pending in said circuit court of Peoria county, wherein the said William S. Moss, Smith Frye, and Charles Greenleaf are plaintiffs, and the said Ransom Gardner, George Goss, and Moses M. Jackman are defendants; now, if the said Ransom Gardner, George Goss, and Moses M. Jackman shall enter in said circuit court of the United States, on the first day of its next session, copies of the processes against them in said suit, so pending as aforesaid, in said circuit court of Peoria court, according to the act of Congress in such case made and provided, then this obligation to be void, else remain in full force and virtue.

RANSOM GARDNER, [SEAL.]
By his attorney in fact,
M. M. JACKMAN. [SEAL.]
GEORGE GOSS, [SEAL.]
By his attorney in fact,
M. M. JACKMAN. [SEAL.]
M. M. JACKMAN, [SEAL.]
N. B. COURTISS, [SEAL.]

The clerk of said circuit court of Peoria county issued also a subpœna in said cause, which, with the return of the Sheriff thereon, is in the words and figures following, to wit:

The people of the State of Illinois to the Sheriff of Peoria County, greeting:

We command you to summon A. Romaney, to appear before our circuit court, on the tenth day of the term thereof, to be held at Peoria, within and for the said county of Peoria, on the 2d Monday of September next, then and there in our said county, to testify and give evidence on behalf of the plaintiffs in a certain cause to be heard and tried, wherein William S. Moss, Smith Frye, and Charles Greenleaf are plaintiffs, and Ransom Gardner George Goss, and Moses M. Jackman, are defendants. Hereof fail not, and make due return of your doings hereon.

Witness Jacob Gale, clerk of our said court, and the seal thereof, at Peoria, this 31st day of August, in the [L. S.] year of our Lord one thousand eight hundred and fifty-four.

JACOB GALE, *Clerk.*

A. Romaney is not found, September 19, 1854.

L. B. COMWELL, *Sh'ff.*

And afterwards, to wit, on the same twenty-seventh day of November, in the year of our Lord 1854, the said circuit court in and for said Peoria county, at the November term thereof, then in session, made the following order in said cause, to wit:

WILLIAM S. MOSS, SMITH FRYE, CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN. } In debt by attachment.

This day came the said Ransom Gardner, George Goss, and Moses M. Jackman, and filed their petition for the removal of this cause to the next circuit court of the United States, within and for the district of Illinois; and the same having been heard and considered, and the court being satisfied of the truth of the facts therein stated, and the said Ransom Gardner, George Goss, and Moses M. Jackman offering Nathaniel B. Curtiss their security for entering in said circuit court of the United States, on the first day of its next session, copies of processes against them, according to the act of Congress in such case made and provided, which security is accepted by the court.

It is therefore ordered that the said William S. Moss, Smith Frye, and Charles Greenleaf do no further prosecute their suit in this court, and that the same may be removed into the said circuit court of the United States, within and for the district of Illinois, according to the act of Congress in such case made and provided.

STATE OF ILLINOIS,
Peoria county, ss.

I, Jacob Gale, clerk of the circuit court within and for the county of Peoria, in the State of Illinois, do hereby certify that the foregoing is a full and correct copy of the processes and returns thereto, papers and pleadings and proceedings of the court, in a certain cause in said circuit court, wherein William S. Moss, Smith Frye, and Charles Greenleaf are plaintiffs, and Ransom Gardner, George Goss, and Moses M. Jackman are defendants, as the same remain of record and on file in my office.

In testimony whereof, I do hereto set my hand and official seal, at the city Peoria, in the county of Peoria, [SEAL.] Illinois, this seventh day of December, A. D. 1854.

JACOB GALE, *Clerk.*

Clerk's fees for transcript $4.25; cost and seal 25 , $4.50.
Received payment of defendants.

JACOB GALE.

Endorsed: Filed Dec. 11th, 1854.

WM. POPE, *Clerk.*

And on the 7th day of January, A. D. 1856, said defendants, by their attorneys, filed in the office of the clerk of the circuit court of the United States, for the northern district of Illinois, their pleas, in the words and figures following, to wit:

Circuit Court United States, Northern District Illinois, December Term, 1855.

RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN,
vs.
WILLIAM S. MOSS, SMITH FRYE, CHARLES GREENLEAF.

1st. And the said defendants, by E. N. Powell, their attorney, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of forty thousand dollars above demanded, or any part thereof, in manner and form, as the said plaintiffs have above thereof complained against them, and of this the said defendants put themselves upon the country, &c. *Pl'ffs doth the like.*

E. N. POWELL,
Att'y for Def'ts.

2. And for further plea in this behalf, the said defendants say actio non, because they say that the said plaintiffs, before and at the time of the commencement of said suit, were and from thence hitherto have been and still are indebted to the said defendants in the sum of fifty thousand dollars for the work and labor, care and diligence, and attendance of the said defendants by the said defendants and their servants before that time done, performed, and bestowed in and about the business of the said plaintiffs, and for the said plaintiffs and at their request; and for divers materials and other necessary things by the said defendants before that time found and provided, and used and applied in and about the said work, and labor for the said plaintiffs and at their request, and for divers goods, wares, and merchandise sold and delivered by the said defendants to the said plaintiffs, and at their like request, and for money by the said defendants before that time lent and advanced to, and

paid, laid out, and expended for the said plaintiffs and at their request, and for money by the said defendants before that time had and received, to and for the use of the said defendants, and for money before that time paid to the said plaintiffs by the said defendants at their request, and for money due and owing from the said plaintiffs to the said defendants for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiffs to the said defendants, and by the said defendants forborne to the said plaintiffs for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiffs to the said defendants upon an account stated between them; which said sum of money so due and owing from the said plaintiffs to the said defendants, exceeds the supposed debt due and owing from the said defendants to the said plaintiffs; and the damages sustained by the said plaintiffs by reason of the detention of the said supposed debt so alleged to be due and owing to the said plaintiffs, as in the said declaration mentioned, and out of which said sum of money so due and owing from the said plaintiffs to the said defendants they the said defendants are ready and willing, and hereby offer to set off and allow to the said plaintiffs the full amount of the said supposed debt and damages, according to the form of the statute in such case made and provided, and this the said defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs ought further to have and maintain their aforesaid action against them.

E. N. POWELL,
Att'y for Def'ts.

And for a further plea in this behalf, the said defendants say actio non, because they say that if there was any such work and labor done and performed by the said plaintiffs for the said defendants on the Peoria and Burean Valley Railroad, and timber, lumber, and ties sold and delivered to the said defendants by the said plaintiffs, and grubbing and clearing, as is stated and set forth in the said declaration, the said work and labor, the said timber, lumber, and ties, and the said grubbing and clearing done, performed, sold, and delivered, were done and performed, sold and delivered, under and by virtue of a certain indenture, contract, or agreement in writing, made heretofore, to wit, on the sixth day of September, in the year of our Lord one thousand eight hundred and fifty-three, to wit, at Peoria county, in the State of Illinois, in the northern district of said State, between the said plaintiffs of the one part, and the said defendants of the other part, and which said indenture, sealed with the seals of the said plaintiffs and defendants respectively, and bearing date the same day and year last aforesaid, which said indenture, sealed with the seals of the said plaintiffs and

defendants respectively, the said defendants now brings here into court, the date whereof is the day and year last aforesaid. And by virtue of a certain other indenture in writing, made heretofore, to wit, on the twenty-eighth day of February, A. D. 1854, at Peoria county, State of Illinois, in the northern district of said State, between the said plaintiffs of the one part, and the said defendants of the other part, and which said indenture, sealed with the seals of the said plaintiffs and defendants respectively, and bearing date the day and year last aforesaid, which said indenture, sealed with the seals of the said plaintiffs and defendants respectively, the said defendants now bring here into court, the date whereof is the day and year last aforesaid. And the said defendants aver that the said plaintiffs, in the said indenture bearing date the sixth day of September, A. D. 1853, covenanted and agreed to grade and construct for the said defendants sections one, two, three, four, five, six, seven, eight, nine, and ten of the Peoria and Bureau Valley Railroad, and furnish all the timber and lumber for bridges, culverts, and cattle-guards for said sections, and all the ties for the said sections of said railroad, and to fence the said sections on each side of said road, and to do all the work and furnish all the timber, lumber, and ties, and complete the said work on or before the first day of March, A. D. 1854, as by said indenture will more fully and at large appear.

And the said defendants further aver, that by the said indenture of the twenty-eighth day of February, A. D. 1854, the time for the completion of the grading and constructing of said sections of said railroad and the furnishing of the timber, lumber, grubbing, clearing, and ties, was extended until the first day of May, A. D. 1854, and for the building of the fence until the first day of July, A. D. 1854, as by said last named contract will more fully and at large appear.

And the said defendants further aver, that although they, the said defendants, have always, from the time of the making of the said indentures and agreements, performed and fulfilled all things on their part and behalf in the said indentures to be performed and fulfilled, and did, on the tenth day of each and every month, pay to the said plaintiffs in current money eighty per cent. on the estimates of the engineer of said railroad on the work and materials delivered on the line of said railroad, in pursuance of said indentures, yet the said defendants, in fact, say that the said plaintiffs, contriving and wrongfully intending to injure the said defendants, did not, nor would perform the said agreements, nor *there* said promise and undertaking, but thereby *craftely* and subtly deceived the said defendants in this, to wit, that the said plaintiffs did not nor would grade and construct sections one, two, three, four, five, six, seven, eight, nine, and ten of the Peoria and Bureau Valley Railroad, and furnish

timber for the bridges, culverts, and cattle-guards, and the ties for said sections, on or before the first day of March, A. D. 1854, as per the terms of said indenture of the sixth of September, A. D. 1853, or on or before the first day of May, A. D. 1854, as per the terms of said indenture of the sixth of September, A. D. 1853, or on or before the first day of May, A. D. 1854, as by the terms of the contract of the twenty-eighth day of February, A. D. 1854; and the said plaintiffs did not, nor would build the fence as required by the terms of said indentures, and complete the same on or before the first day of March, A. D. 1854, or the first day of July, A. D. 1854. Nor have the said plaintiffs at any time since the first day of May, A. D. 1854, done or performed the grading and constructing of said sections, nor furnished the timber and ties necessary for said railroad, nor built the said fence, but, on the contrary, to wit, on the sixteenth day of August, A. D. 1854, the said plaintiffs abandoned said work, and so notified the said defendants; and although the said plaintiffs had not performed their said agreements within the time limited in that behalf, yet the said defendants were willing to have the said plaintiffs to finish and complete the whole of said work, and furnish all the materials, in pursuance of their said agreements, and requested the said plaintiffs to complete said work, yet they wholly neglected and refused so to do, whereby the said defendants sustained great damage by reason of the non-completion of said work, and the furnishing of the timber and ties for said railroad, to wit, the sum of fifty thousand dollars, and this the said defendants are ready to verify; wherefore they pray judgment whether the said plaintiffs should further have or maintain their aforesaid action against them.

E. N. POWELL,
Att'y for Def'ts.

Endorsed: Filed January 7th, 1856.
WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 22d day of January, A. D. 1856, said plaintiffs, by their attorneys, filed in said clerk's office their replication to defendants pleas, which said replication is in the words and figures following, to wit:

In Circuit Court of the United States, Northern District of Illinois, December Term, 1856.

WM. S. MOSS, SMITH FRYE, CHARLES GREENLEAF,
vs.
RAMSON GARDNER, GEORGE GOSS, MOSES M. JACKMAN.

And the said plaintiffs, for replication to the said defendants second plea, say precudi non, because they say that they are

not now and were not at the time when, &c., indebted to the said defendants, in manner and form as stated in the said plea, and of this they put themselves upon the country, &c.

MANNING & PURPLE.

And for answer to said defendants third plea, plaintiffs say, precludi non, because they say that the said plea, and the matters and things therein contained, are not sufficient in law to bar or preclude the said plaintiffs from having and maintaining their action aforesaid against the said defendants, and that they are not bound in law to answer the same, and this they are ready to verify, wherefore they pray judgment, &c.

Plaintiffs assign for special cause of demurrer, that said plea amounts to the general issue only.

MANNING & PURPLE,
For Pl'ffs.

Endorsed: Filed Jan'y 22nd, 1856.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 22nd day of January, A. D. 1856, in the record of the proceedings of said court in said cause, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN.	Attachment removed from Peoria Circuit Court.

The court sustains the demurrer of the plaintiffs, heretofore filed by their attorneys to the special plea of the defendants; and now come the parties by their attorneys, and upon issue joined, thereupon came a jury of good and lawful men, to wit: S. H. Hogan, William Barber, James Michie, John Sibley, F. C. Jostlyn, Samuel Burgess, James Campbell, John Soltell, John S. Vandosen, W. S. Steel, N. W. Howell, and Daniel Driscoll, who were duly elected, tried, and sworn; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 23d day of January, A. D. 1856, in said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, AND MOSES M. JACKMAN.	Attachment.

The jury yesterday empanneled in this cause, this morning returned into court, and now come the parties by their attor-

neys, and after proceeding in the examination of witnesses until the hour of adjournment without concluding the testimony, the further trial of the cause is postponed until to-morrow morning.

And on the next day, to wit, the 24th day of January, A. D. 1856, in said records of said court, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDINER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

The jury heretofore empanneled in this cause, this morning returned into court, and now come again the parties by their attorneys; and after the plaintiffs had closed their testimony, the hour of adjournment having arrived, the further trial of this cause is postponed until to-morrow morning.

And on the next day, to wit, the 25th day of January, A. D. 1856, in the said records of said court, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the parties, by their attorneys, and also the jury heretofore empanneled; and after proceeding in the trial of the cause until the hour of adjournment without concluding, the further trial of the cause is postponed until to-morrow morning.

And on the next day, to wit, the 26th day of January, A. D. 1856, in said records of said court, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN. } Attachment.

This day came again the parties, by their attorneys, and also the jury heretofore empanneled, and after proceeding in the trial of the cause until the hour of adjournment without concluding, the further trial of the cause is postponed until Monday morning next.

And afterwards, to wit, on the 28th day of January, A. D. 1856, in said records of said court, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and also the parties, by their attorneys; and after proceeding in the trial of the cause until the hour of adjournment without concluding, the further trial of the cause is postponed until to-morrow morning.

And on the next day, to wit, the 29th day of January, A. D. 1856, in said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and now come also the parties, by their attorneys; and after hearing further testimony in the cause without concluding, the further trial of the cause is postponed until to-morrow morning.

And on the next day, to wit, the 30th day of January, A. D. 1856, in said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and also the parties by their attorneys; and after closing the testimony the hour of adjournment having arrived, the arguments of counsel are postponed until to-morrow morning.

And on the next day, to wit, the 31st day of January, A. D. 1856, in said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and also the parties, by their attorneys; and the arguments of counsel having been heard until the hour of adjournment without concluding, when the further arguments of counsel are postponed until to-morrow morning.

And on the next day, to wit, the 1st day of February, A. D. 1856, in the said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and also the parties by their attorneys; and after hearing the arguments of counsel until the hour of adjournment without concluding, the further arguments of counsel are postponed until to-morrow morning.

And on the next day, to wit, the 2nd day of February, A. D. 1856, in said records of said court in said cause is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now come again the jury heretofore empanneled in this cause, and also the parties, by their attorneys; and after hearing the concluding arguments of counsel, and receiving instructions from the court, the jury retired to consider of their verdict; and it is ordered by the court, by agreement of the parties by their attorneys, that the jury, when they shall have agreed upon their verdict, may sign and seal the same, and disperse, and meet the court on Monday morning next at ten o'clock.

And afterwards, to wit, on the 4th day of February, A. D. 1856, in said records of said court is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLIEF, vs. RANSOM GARDINER, GEORGE GOSS, MOSES M. JACKMAN. } Attachment.

The jury heretofore empanneled in this cause, this day returned into court with the following verdict, to wit:

We, the jury, find the issue for the plaintiffs. We find their debt to be fourteen thousand four hundred and sixty-eight dollars and ninety-eight cents, and assess their damages at the sum of two cents.

And on the next day, to wit, the 5th day of February, A. D. 1856, in the said records of said court in said cause is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE,
CHARLES GREENLIEF,
vs.
RANSOM GARDNER, GEORGE GOSS,
MOSES M. JACKMAN.
} Attachment.

The defendants, by their attorneys, move the court for a new trial of this cause.

And afterwards, to wit, on the 11th day of February, A. D. 1856, the above named defendants, by their attorneys, filed with the clerk of said court the following affidavit, to wit:

UNITED STATES OF AMERICA,
Northern district of Illinois, ss.

Circuit Court of the United States, for the Northern District of Illinois.

WILLIAM S. MOSS, SMITH FRYE,
CHARLES GREENLEAF,
vs.
GEORGE GOSS, MOSES M. JACKMAN,
RAMSON GARDNER.

This day personally appeared before me, the undersigned, clerk of the circuit court of the United States for the northern district of Illinois, Moses M. Jackman, one of the defendants in the above entitled cause, who, being duly sworn, deposes and says, that he has been informed and verily believes the same to be true, that on Saturday evening, the second day of February instant, after the jury in the above entitled cause had retired to consider of their verdict, and after the jury had agreed upon their verdict, and sealed the same up, and delivered the same to the clerk of said court, that three of the jurors in the said cause went to the Briggs House, in the city of Chicago, and to the room of William S. Moss, one of the plaintiffs, and stated to him, the said Moss, that the jury in the said cause had agreed upon their verdict, and had sealed the same up and delivered it to the clerk, and that they wanted the oysters. And thereupon said Moss went with the said jurors to the saloon, under the former McArdle House in said city, and treated the said jurors to liquor and an oyster supper.

Affiant further states, that he has been informed and believes the same to be true, that after the said Moss and the jurors aforesaid had partaken of the refreshments as aforesaid, the said Moss took two of said jurors to the theatre and paid for

their tickets, and while on their return from the theatre, said Moss took said two jurors into the Young America, and treated them to liquor.

Affiant further says that he has learned the said facts, in the main, from the jurors who partook of the oysters and liquor, as above stated, and since the jury has been discharged in said cause.

Affiant further states, that the verdict of the jury had been made public before the meeting of the court on Monday morning, the 4th instant, and that affiant heard of the amount of the verdict, before the sealed verdict of the jury was opened; and affiant verily believes that some one of the jurors in said cause communicated to said Moss or to his counsel, or some friend, the result of the deliberation of the jury before the meeting of the court, on the morning of the fourth instant.

MOSES M. JACKMAN.

Subscribed and sworn to before me, this 5th day of February, A. D. 1856.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Feb'y 11th, 1856.

WM. H. BRADLEY, *Clk.*

And afterwards, to wit, on the 22nd day of February, A. D. 1856, in said records of said court in said cause, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN. } Attachment.

On motion of the defendants, by their attorneys, leave is granted them by the court to file affidavits in support of their motion for a new trial, until the first day of March next, upon their furnishing the attorneys of the plaintiffs with copies of the same.

And afterwards, to wit, on the 1st day of March, A. D. 1856, in said records of said court, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN. } Attachment.

On motion of the defendants, by their attorneys, the time within which they have leave to file affidavits in support of their motion for a new trial of this cause, is extended until Wednesday morning next; and on further motion of the defendants,

by their attorneys, they have until Monday morning next to file their reasons for a new trial of this cause.

And afterwards, to wit, on the 3d day of March, A. D. 1856, said defendants, by their attorneys, filed in said clerk's office their reasons for a new trial, in the words and figures following, to wit:

Circuit Court of the United States, in and for the Northern District of Illinois, held at Chicago.

Moss, Frye, et al.
vs.
Goss, Jackman, et al. } Action debt.

The said defendants assign as reasons why the verdict heretofore rendered in this case should be set aside, and a new trial granted:

1st. The court on the trial permitted evidence to go to the jury for the plaintiffs, and against the objections of the defendants, which ought to have been excluded.

2nd. The court rejected and excluded evidence offered by defendants, which ought by law to have been admitted, and permitted to have gone to the jury.

3d. The court refused to allow defendants to put questions to witnesses on account of their form, when the form was proper and allowable, and related to a subject matter proper to be considered by the jury.

4th. The court misdirected the jury.

5th. The verdict of the jury is against the law.

6th. The jury disregarded the instructions of the court.

7th. The verdict is against the evidence.

8th. The verdict is not warranted by the evidence, and is against the law and the evidence.

9th. The verdict is excessive in amount, and cannot be deduced from the evidence.

10th. The verdict ought to be set aside, because of the misconduct of one or more of the jurors who tried the case, in this:

1st. That after they were sworn as jurors in the case, and before the verdict was rendered, they drank of ardent spirits.

2d. After being sworn as jurors in the case, and before the verdict was rendered, they accepted of and received from one of the plaintiffs entertainment and refreshments—both food and drink—at the expense of said plaintiffs.

11th. Because of the improper act of one of the plaintiffs, William Moss, in this: That after said jury was sworn in the case, and before the said verdict was rendered, he improperly, at his own costs, gave to one or more of said jury ardent spirits and oysters, and otherwise entertained them, and they accepted of and received such hospitality.

As a specification of some of the particulars, to which the first reason applies, defendants call the attention of the court to the admitting in evidence the notice by pl'ffs to defendants, dated Jan. 11th, 1854; also, the letter to Mr. Jervis by pl'ffs, and the reply of Mr. Jervis, of same date; also, to the testimony of the witness Underhill as to service of injunctions, which were not produced; also, to the testimony of the witness Gallagher of a like character; also, the testimony of Mr. Bryantos to suspension of work in 1853.

As a specification of some of the matters to which the second reason applies, the defendants call the attention of the court to the exclusion of defendants contract with Farnam & Co., offered by defendants; also, to the exclusion of the testimony of Warner as to instructions given him by Jackman as to the manner of making up the estimates on which money was paid to pl'ffs, mentioned in the receipts.

As a specification of some matters to which the 3rd reason applies, defendants call the attention of the court to the refusal to permit defendants to ask Wheaton 1st to state whether or not "he, as engineer, ever at any time, and if so, when and where, rejected as unsuitable any hewed ties, which were hewed with two parallel sides, and had six inches or more hewed surface, and were sound, and of either white oak, burr oak, black walnut, cedar, butternutt, red elm, or blue ash timber."

2nd. Whether he ever rejected, and if so, when and where, any sawed ties, which were of either of the kinds of timber in last question named, and which were sound, and eight inches wide and six inches thick.

Endorsed: Filed March 3d, 1856.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 5th day of March, A. D. 1856, said defendants, by their attorneys, filed with the clerk of said court the following affidavit of E. N. Powell, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern district of Illinois, ss.

Circuit Court United States, Northern District of Illinois, December Term, A. D. 1855.

WILLIAM S. MOSS, SMITH FRYE, CHARLES GREENLEAF,
vs.
GEORGE GOSS, MOSES M. JACKMAN, RANSOM GARDNER.

This day personally appeared before me, the undersigned, clerk of said court, Elihu N. Powell, who, being duly sworn,

deposes and says, that on Saturday evening, the second day of February, A. D. 1856, and about seven o'clock in the evening of said day, affiant, with several other gentlemen, was in the room of William S. Moss, one of the plaintiffs in the above entitled cause, at the Briggs House in the city of Chicago; and after the jury in said cause had retired to consider of their verdict, and before the verdict had been opened and received by the court, and while these three of the jurors who tried said cause (and whose names, affiant believes, were Howell, Van Dusen, and Driskell) came into the room of said Moss when we were at the Briggs House, and remarked that the jury had agreed upon their verdict, and had sealed it up and given the same to the clerk, and that they now wanted the oysters; that they had looked below for Jackman, but did not find him. Thereupon, said Moss arose from his seat, and remarked, in a very emphatic manner, "that he was in for that," and asked the said jurors to take something to drink, when, to affiant's best recollection, some one or more of the said jurors went with said Moss to the table where said Moss had liquor, and took a drink of whiskey with him; and immediately afterwards the said Moss and the said three jurors left the room together, with the avowed purpose of getting the oysters; that affiant afterwards, and as late as eleven o'clock on the same evening, saw said Moss and one or more of the said jurors in company together at the Briggs House; and further saith not.

E. N. POWELL.

Subscribed and sworn to before me this 3rd day of March, A. D. 1856.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed March 5th, 1856.

WM. H. BRADLEY, *Clerk.*

And on the same day, to wit, the 5th day of March, A. D. 1856, said defendants, by their attorneys, filed with the clerk of said court the following affidavit of Norman Smith, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss.

Circuit Court of the United States, for the Northern District of Illinois.

WILLIAM S. MOSS, SMITH FRYE, CHARLES GREENLEAF,
vs.
GEORGE GOSS, MOSES M. JACKMAN, RAMSON GARDNER.

This day personally appeared before me, the undersigned,

justice of the peace of the said district, Norman Smith, who, being duly sworn according to law, deposes and says, that on Saturday evening, the second day of February, A. D. 1856, about eleven o'clock, he saw William S. Moss, one of the plaintiffs in the above entitled cause, in conversation with two of the jurors who tried said cause; that said Moss and the said jurors were in the Young America together, standing at or near the bar of the drinking saloon; that the Young America is one amongst the largest drinking saloons in the city of Chicago, as affiant believes.

Affiant further states, that he does not know the names of the jurors he saw with said Moss, but affiant knows that the persons he saw with said Moss as aforesaid were jurors in said cause; and further saith not.

NORMAN SMITH.

Affiant further states, he saw Mr. Jackman in conversation with one of jurors in the theatre the same evening. Said juror stated the verdict was sealed, and did not state the result of said evidence. NORMAN SMITH.

Subscribed and sworn to before me this 1st day of March, 1856.
ETHAN Z. ALLEN, *Jus. Peace.*

STATE OF ILLINOIS,
Lasalle county, ss.

I, Samuel W. Raymond, clerk of the county court in and for said county, do hereby certify that Ethan Z. Allen, esquire, whose name appears to the annexed affidavit, was, at the time of signing the same, an acting justice of the peace in and for said county, duly commissioned and qualified, and as such full faith and credit is and of right ought to be given to all his official acts.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Ottawa, this 1st day of March, 1856. [SEAL.]

J. W. RAYMOND, *Clerk.*

Endorsed: Filed March 5th, 1856.
WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 14th day of March, A. D. 1856, the following affidavits were filed in said clerk's office, to wit:

UNITED STATES OF AMERICA,
State and Northern District of Illinois, ss.

MOSS, FRYE, & Co.
vs.
GOSS, JACKMAN, & Co.

Nathaniel W. Howell and Daniel D. Driscoll being duly sworn, say that they have seen and read the affidavit of Norman Smith, filed in this cause, on the motion to set aside the verdict; that they are the two jurors referred to in said affidavit, who were seen conversing with Capt. Moss in the Young America.

Affiants state that at the time referred to they had no conversation whatever with him in relation to said verdict, nor did they ever at any time before said verdict was delivered in court, either tell or intimate to him what said verdict was, or whether it was for or against him.

That they are also two of the jurors who called at Captain Moss's room, as stated in Mr. Powell's affidavit; that this, and also the conversation at the Young America, occurred after the jury had agreed, written out, and sealed up their verdict, and delivered the same to the clerk of this court, and dispersed, as directed by the court, under the agreement of the parties; and further say not.

DANIEL D. DRISCOLL,
NATH. W. HOWELL.

Sworn to and subscribed before me by N. W. Howell, this 6th day of March, A. D. 1856.

WM. H. BRADLEY, *Clerk.*

Subscribed and sworn to before me this 6th March, 1856, by Danl. D. Driscoll.

J. T. MOULTON,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss.

MOSS, FRYE, & Co.
vs.
JACKMAN & Co.

John S. Van Dusen, being sworn, says that he is one of the jurors who called at Capt. Moss's room, as stated by Mr. Powell in his affidavit; that this was after the jury had sealed their verdict and delivered it to the clerk; that at this nor any other time before said verdict was received in open court, did he ever have any conversation with said Moss or in his presence about said verdict, nor tell him nor intimate to him what it was, or whether for or against him; and further said not.

JOHN S. VAN DUZEN.

Subscribed and sworn to before me this 6th day of March, A. D. 1856.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed March 14th, 1856.
WM. H. BRADLEY, *Clerk.*

And on the same day, to wit, the 14th day of March, A. D. 1856, in the records of the proceedings of said court in said cause, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

Now at this day came on to be heard the motion of the defendants, heretofore filed for a *a* new trial of this cause; which motion, after arguments of counsel, is taken under advisement by the court.

And afterwards, to wit, on the 3d day of June, in the adjourned May term, A. D. 1856, of said court, in the record of the proceedings thereof in said cause, is the following entry, to wit:

WILLIAM S. MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN. } Attachment.

The court having fully considerd, and being fully advised upon the motion of the defendants, heretofore filed by their attorney for a new trial of this cause, overrules the same. It is thereupon considered and adjudged by the court, that the plaintiffs have and recover of and from the said defendants the sum of fourteen thousand four hundred and sixty-eight dollars and ninety-eight cents their debt, and two cents their damages, amounting together to the sum of fourteen thousand four hundred and sixty-nine dollars as aforesaid found and assessed by the jury, together with their costs by them about their suit in this behalf laid out and expended, and also their costs in the State court, amounting together to the sum of six hundred and thirty-two dollars and eleven cents, and that they have execution therefor.

On the trial the following exceptions were made and allowed, to wit:

WILLIAM MOSS, SMITH FRYE, & CHARLES GREENLEAF, vs. RANSOM GARDNER, GEORGE GOSS, & MOSES M. JACKMAN.

Be it remembered, that on the trial of this case, the plaintiffs read in evidence a contract as follows, viz:

PEORIA AND BUREAN VALLEY RAILROAD.

GENERAL SPECIFICATIONS.

Grubbing and Clearing.

1. All trees and brushwood within the bounds of the company's land must be chopped low and burned up or removed, so as not to obstruct the lines for fences, or injure the adjoining land. All logs, bushes, and other perishable materials shall be removed from the space to be occupied by the embankments, and in general the trees, stumps, and roots shall be grubbed out between the slope stakes, except where the embankments exceed two and a half feet in height; in the latter case, they shall be cut off close to the ground.

Grading.

2. *Earth excavation.*—The earth shall be excavated true and even to a prism, not less than twenty feet wide at a grade line in cuttings, with slopes in general of one and a half horizontal to one vertical, but varying from this according to circumstances, at the discretion of the engineer. The disposition of surplus material and the borrowing of material to complete the embankments, shall be in such places, manner, and quantities as the engineer may direct.

3. *Rock excavation.*—Rock shall be excavated reasonably true and even to a prism, not less than fourteen feet wide at the grade line, with slopes of one horizontal to five vertical, subject to the direction of the engineer, as in earth cutting.

4. Embankments shall have such width as the engineer may direct. In general, the slopes will be one and a half horizontal to one vertical. No stumps, logs, brush, or other perishable materials will be allowed in the embankments, and the muck or vegetable matter beneath the same shall be removed, when required by the engineer. When side ditches are excavated for drainage, or in borrowing materials for embankments, they shall be cut true and even at such distances from the foot of the embankments as the engineer may direct, and with the slope nearest the embankments not steeper than one and a half to one. The dressing and furnishing of the surface of the road bed, and of the slopes of excavations and embankments, shall conform *exactly* to the lines and levels given by the engineer, and shall be done to his satisfaction.

5. *Road bed.*—When the materials in the bottom of the ex-

cavations, in the opinion of the engineer, is unfit for road bed, it shall be removed to a depth not exceeding two feet below the grade line, and replaced by gravel or other suitable material. The upper portion of the embankments shall also be formed, when required, of gravel or other proper ballasting, not exceeding two feet in depth.

6. *Ditching.*—All excavations shall have ditches on each side, of such form and dimensions as the engineer may direct. Other ditches along embankments or elsewhere, for protection or drainage, shall be made by the contractors, when required.

7. *Roads and water courses.*—Changes of public or private roads, and of streams, also the grading of side tracks and of road and farm crossings, and such other earthwork as in the opinion of the engineer may be necessary, shall be done when required by him, and shall conform truly to his levels, measurements, and directions.

8. The engineer reserves the right to change the line of roadway, grade, or section stake, before or during the progress of the work; provided that, in case such alteration shall increase the expense to the contractor, said extra expense shall be estimated by the engineer, and paid for by the party of the second part.

9. All work above specified shall be measured in excavation, and come under the head of "earth" or "solid rock." By solid rock will be understood rock as found in ledge or in boulders, exceeding one cubic yard. All other excavation, of whatever kind or quality, shall be termed earth, and paid for as such at the price of earth excavation.

Masonry.

10. *Foundations.*—In cases where, in the opinion of said engineer, it will be expedient to use bearing piles for a foundation, they shall be driven in such manner and of such lengths as said engineer may direct. After the piles are driven and capped, the spaces around them shall be filled with loose stone or coarse gravel. A floor of oak plank shall be laid on the cap timber, and well treenailed to them. On this floor the masonry shall be commenced. In cases where bearing-piles will not be used, a proper base shall be formed, as said engineer shall direct, on which oak timbers shall be laid, and any spaces between them filled with gravel and well *rammed* down. On these timbers a floor of oak plank shall be laid, and well treenailed to them. If, in the opinion of said engineer, timbers may in any be dispensed with, then the foundation shall be made in such manner as he may direct.

11. *Culverts.*—The abutments, piers, arches, spandals, parapets, walls, and wings, to conform to plans that may be furn-

ished by the engineer. The masonry to be of the style of rough hammered work, laid in a neat and compact manner, and well banded; no stone to be used in the face that is less than six inches thick and twelve inches long, and will not bed twelve inches in the wall. Stone in all cases to be laid on their broadest beds, and no stone to have more height than bed. The archstone to be in general of such depth as to lay the full thickness of arch, when not more than fifteen inches, and of no greater than two-thirds the depth of arch, and laid so that their beds conform to the radius of the arch. Culvert masonry shall be even laid in mortar, composed of one part best hydraulic cement, and three parts clean sand, well mixed and properly used after mixture. No mortar that has been made more than three hours shall be put in masonry.

12. Bridge masonry will be composed mostly of abutments and piers. The style and manner of workmanship shall be the same as specified for culverts.

13. In all filling around masonry or other walls, care shall be taken to use small stones, sand, or gravel, that will not be liable to heave with frost.

14. No hydraulic cement is to be used until it shall have been tested and approved by said engineer.

15. All masonry shall be carried up in a regular manner, and leveled off in courses of not less than eighteen inches in height, if required by said engineer.

16. Stone used in the masonry shall be of sound and durable, and free from dirt.

Timber and Trestle Work.

17. The timber for wooden culverts, bridges, trestle work or other structures, including all sawed lumber and plank, must be of sound and thrifty white oak or white pine, free from wane, sap, shakes and other defects. The lengths and dimensions must conform exactly to the bills furnished by the engineer, who shall have power to reject all such sticks as in his opinion are unfit for the work. The framing must be executed in a workmanlike manner, in conformity with the plans and directions of the engineer, and to his entire satisfaction.

18. All the quantities upon which the proposals are based are to be considered as approximate only, and the right is reserved to the engineer of having such amounts of grading done on such kinds or quantities of masony built, or timber or any other material delivered, as the economy of the work may in his discretion require, and of substituting one kind for another.

19. If any foreman, overseer, or laborer employed by the contractor, shall, in the opinion of the engineer, execute his

work in an unfaithful or unskilful manner, or be disrespectful or riotous in his conduct, he shall forthwith, by direction of said engineer, be discharged; and no person shall be employed upon the work who has been so discharged from any work, within the knowledge of the contractor or engineer.

20. On notice being given by any laborer or workman that he is not regularly paid by the contractor, and satisfactory evidence being shown of the truth of the statement, the party of the second part may pay said laborer or workman, and charge the same to said contractor as cash on account.

21. If any damage be done by the contractor, or by any person in his employ, to the land or property adjoining or in the vicinity of his work, the engineer shall have the right to estimate such damage and pay the amount to the owner of such land or property, and charge the same to said contractor.

22. The engineer will be the judge whether the work is progressing with sufficient rapidity to ensure its completion within the time specified; and if, in his opinion, the work is not thus progressing, he may employ other assistance, the cost of which shall be paid by the contractor.

23. All work and materials of every description, are to be at the risk of the contractor until his whole job shall be completed and accepted; the contractor having no right to demand that any part of his work be finally estimated until the completion of all the work contracted for.

A more full explanation of the form and dimensions of materials and parts, and of the manner of constructing the work in all its details, will be furnished by the engineer; who will also give such directions from time to time during the progress of the work, as may appear to him necessary and proper, in order to render the work complete and perfect on the plan contemplated in the foregoing specifications. And the said directions shall in every respect be complied with, and the entire work finished to the full satisfaction of the engineer.

Ties to be of sound white or burr oak, black walnut, cedar, butternut, red elm, blue ash, or such other timber as the engineer may direct, to be hewed with two panelled sides; sides having at least six inches hewed surface, or if sawed, eight inches wide and six inches thick, subject to the inspection and approval of the chief engineer of said railroad. Board or rail fence to be built according to the plans and specification, and approved of said engineer.

Peoria and Burean Valley Railroad.

This agreement, made and concluded this fifth day of September, one thousand eight hundred and fifty-three, between William S. Moss, Smith Frye, Charles Greenleaf, and Charles

S. Clark of the first part, and Ransom Gardner, George Goss, and Moses M. Jackman of the second part, witnesseth:

The aforesaid party of the first part, in consideration of the prices hereinafter agreed to be paid by the party of the second part, hereby covenants and agrees to grade and construct sections one, two, three, four, five, six, seven, eight, nine, and ten, of the Peoria and Bureau Valley Railroad, in such manner as shall conform in every respect to the annexed specifications, which shall be considered as part of this contract, and to the following conditions:

1. The work shall be commenced within six days after the execution of this contract, and shall be completed on or before the first day of March, one thousand eight hundred and fifty-four.

2. The work shall be executed under the direction and supervision of the engineer of the company, by whose measurements and calculations the amounts of the several kinds of work performed under this contract shall be determined; and who shall have full power to reject or condemn all work or materials which, in his opinion, do not fully conform to the spirit of this agreement; and shall decide all questions which may arise between the parties relative to the execution thereof: and his decision shall be final and binding upon both parties.

3. Any omission to disapprove of defective work, at the time of any estimate, shall not be construed as an acceptance of said work.

4. If the party of the first part refuses or unreasonably neglects to remedy any imperfection which may be pointed out by the engineer, or by the party of the second part, or fails to prosecute the work with the required dispatch, or in any manner violates the conditions of this contract, so that in the judgment of the engineer, or in the judgment of the party of the second part, there may be just grounds of apprehension that the work will not be completed in the manner or within the time herein specified, then the engineer, or said party of the second part, may serve a written notice upon said party of the first part, specifying the manner and the time in which said party shall cause such grounds of apprehension to be removed; and if at the expiration of said time, said grounds of apprehension are not removed, then full power and authority is hereby vested in said engineer, or in said party of the second part, to declare this contract forfeited; and on such declaration being given in writing by the engineer or by said party of the second part to the party of the first part, or if said notice shall be given by the engineer, then, to the parties hereto, this contract shall cease immediately; and the said party of the second part shall be entitled to the reserved per centage, as a consid-

eration for the damages that may be sustained by reason of the forfeiture of this contract.

In consideration of the faithful performance of all the conditions of this contract, the party of the second part agree to pay said party of the first part, on the estimate of the engineer, as follows:

For clearing and side chopping the section, as specified, twenty dollars per acre.

For earth excavation, at the rate of sixteen and one-half cents per cubic yard.

For excavation of rock, including stone, measuring over one cubic yard, at the rate of cents per cubic yard.

For rubble masonry, laid dry, at the rate of cents per cubic yard.

Grubbing per mile, at the rate of three hundred dollars.

For rubble masonry laid in cement, at the rate of dollars per cubic yard.

For well hammered masonry, laid in cement, at the rate of dollars per cubic yard.

For timber and plank in foundations and bridges, at the rate of twenty-five dollars per M. ft., b'd meas'e.

For timber and plank in wood culverts and cattle guards, at the rate of twenty-five dollars per M. ft., b'd meas'e.

For fence at the rate of one dollar per rod.

For cross ties, distributed on or near the track bed, thirty-five cents per tie.

The prices above specified are to be in full compensation for all the materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract.

In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad. The said party of the second part will pay in current money eighty per cent.

Twenty per cent. of the estimates, as they are made to the party of the first part, may be retained by the party of the second part as damages, in case of a forfeiture of this contract; which said twenty per cent., together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part, within thirty days after all the work herein contracted for is completed, and accepted by the engineer.

The above payments on estimates shall be made on the tenth day of each month, at the office in Peoria.

It is further agreed that the cross ties shall be distributed on or near the track-bed of said road. Forty ties between stations

of one hundred feet, including side tracks on the sections above named.

It is further agreed, that in case cemented clay or gravel is excavated, the price for the same shall be agreed upon by the parties to this contract, or in case the parties cannot agree, the same shall be estimated by the chief engineer of said road, and his decision shall be final between the parties.

In witness whereof, said parties have hereunto set their hands and seals the day and year first written.

In presence of—

	WM. S. MOSS,	[SEAL.]
	SMITH FRYE,	[SEAL.]
(Signed,)	CHARLES GREENLEAF,	[SEAL.]
	CHAS. S. CLARK,	[SEAL.]
	GOSS, JACKMAN, & Co.	[SEAL.]

And also read to the jury another contract, which was in the words and figures following, to wit:

Whereas, on the sixth day of September, A. D. 1853, a contract was entered into by and between William S. Moss, Smith Frye, Charles Greenleaf, and Charles S. Clark, parties of the first part, and Ransom Gardner, George Goss, and Moses M. Jackman, parties of the second part, in which said contract the aforesaid parties of the first part covenanted and agreed to and with the said parties of the second part, in consideration of the prices agreed to be paid by the said parties of the second part, to grade, *grubb*, and clear sections number one, two, three, four, five, six, seven, eight, nine, and ten of the Peoria and Burean Valley Railroad, and also to furnish all the timber necessary for all bridges, culverts, and cattle-guards, and all the ties for said sections, except for pile bridging, as by said contract will more fully appear; and which said contract is still to be and remain in full force, except so far as the same may be hereby expressly changed or modified. And whereas, by said contract, all of the work as required to be done by the said contract, and all the timber and ties as aforesaid to be furnished, was to be done and furnished on or before the first day of March, A. D. 1854. And whereas, owing to delays in obtaining the *wright* of way, it will be out of the power of the said parties of the first part to complete said work and furnish all the timber and ties as aforesaid within the time stipulated in said contract. Now, therefore, these presents witnesseth, that for divers good and sufficient considerations moving between the said parties mutually, it is hereby agreed between the said William S. Moss, Smith Frye, Charles Greenleaf, and Charles S. Clark, the said parties of the first part in the said contract, and Ransom Gardner, George Goss, and Moses M. Jackman, the parties of the second part:

First. The said Ransom Gardner, George Goss, and Moses M. Jackman do hereby agree to extend the time for the grubbing, clearing, and grading the said sections, and the furnishing of the timber, ties, &c., to be done and furnished according to the terms of said contract, until the first day of May, A. D. 1854, provided the said Moss, Frye, Greenleaf, and Clark shall so complete the said grubbing, clearing, grading, and furnish the timber for the bridges, culverts, and cattle-guards, as aforesaid, and the ties for said sections, so as to keep out of the way of the track-layers at either end of said sections, whenever or wherever the said Gardner, Goss, and Jackman may wish to commence the laying of the rails on said road. And provided further, that in case it should become necessary, either before or after the said first day of May, for said Gardener, Goss, and Jackman, in order to keep out of the way of the track-layers, to have the grading done faster than the said Moss, Frye, Greenleaf, and Clark are doing it, or the timber for the bridges, culverts, and cattle-guards furnished faster than they are furnishing it, then in that event, they, the said Gardener, Goss, and Jackman are to have the right to put hands to work on said sections to grade the same, which hands so put on said work, are to be paid by said Moss, Frye, Greenleaf, and Clark. And in case the said Gardener, Goss, and Jackman shall furnish any timber for the bridges, culverts, and cattle-guards, they shall be allowed the same price as the said Moss, Frye, Greenleaf, and Clark, get by the terms of said contract.

Second. The said Gardner, Goss, and Jackman hereby agree to give to said Moss, Frye, Greenleaf, and Clark, and they hereby agree to receive the sum of four thousand dollars, which sum is to be in full for all the grubbing done, and to be done on the whole ten sections of said road; one half of which sum is to be paid in the stock of the Peoria and Bureau Valley Railroad Company at par, and one-half in cash, which sum in cash is to be paid in estimates of the engineer of said road as the work progresses, and the stock to be delivered within thirty days after the whole work is completed, as per said contract.

Third. The said Gardner, Goss, and Jackman do hereby agree to pay to said Moss, Frye, Greenleaf, and Clark one-half cent on each and every cubic yard of excavation now done, or hereafter to be done, on the whole ten sections of said road, over and above the price agreed upon in the said contract, which is to be paid in the stock of said company at par when the final estimate is made and the whole grading completed according to the said contract.

Fourth. The said Gardner, Goss, and Jackman do hereby further agree, that they will take all the timber now furnished, and hereafter to be furnished, and which is to be furnished according to the said contract for the whole ten sections, at twenty-

five dollars per one thousand feet, board measure, to be paid for according to estimates made by the engineer of said road, as provided for by said contract. The said timber is to be such as will be received by the engineer of said road. And the said Moss, Frye, Greenleaf, and Clark hereby agree, that they will furnish and deliver on or before the first day of May, A. D. 1854, all the timber necessary to build all the bridges, (except for the pile bridges,) culverts, and cattle-guards on the whole ten sections, and to furnish all the ties necessary for the whole ten sections; which ties are to be such as will be received by the engineer of said road, and according to the terms of the said contract; and which timber and ties are to be furnished in time, so as to keep out of the way of the track-layers.

Fifth. The said Moss, Frye, Greenleaf, and Clark hereby agree, that they will deduct from the whole amount of timber furnished for the bridges, culverts and cattle-guards, the sum of one thousand dollars, which sum is to be deducted out of the final estimate made by the engineer according to the terms of said contract when the whole work shall be completed. And the said Gardner, Goss, and Jackman hereby agree to release the said Moss, Frye, Greenleaf, and Clark from the building of the bridges, culverts, and cattle-guards, as is stipulated for in the said contract; and they agree to build the whole of said bridges, culverts, and cattle-guards at their own expense.

Sixth. The said Gardner, Goss, and Jackman hereby agree to extend the time for the fencing of the said ten sections until the first day of July, A. D. 1854; but the said Moss, Frye, Greenleaf, and Clark are to be responsible for any neglect on their part on account of damages done to crops of the owners of land through whose land the road passes.

Seventh. The fence to be built by said Moss, Frye, Greenleaf, and Clark, as stipulated for in said contract, is to be as follows, to wit: board fence is to be four boards high, boards not less than six inches wide and one inch thick; posts to be seven feet long, and of such timber as required by the said contract for ties or rail fence; rails to be ten feet long and six rails high, staked and ridued, and not less than four feet worm, and the corners of the fence on the ground to be laid on blocks of wood or on stone. The said fence to be securely attached to the cattle-guards and culverts, whenever the same may be required, and bars out of the boards to be built at all farm crossings on the line of said road, and to be paid for at the same rate as the fence; all to be done to the satisfaction and approval of the engineer of said road, as stipulated for in said contract.

It is hereby stipulated and mutually agreed between the parties hereto, that the said contract of the sixth day of September, A. D. 1853, in all its parts, except those parts which this instrument changes or modifies, is in all respects to remain in

full force, and when the work to be done as hereby required, or timber or ties to be furnished, the same is to be done or furnished as provided for in said contract, whether the same is so specified herein or not, and all to be subject to the approval of the chief engineer.

And it is further hereby mutually agreed by the parties hereto, that the said William S. Moss, Smith Frye, and Charles Greenleaf, have purchased from said Charles S. Clark all of his interest in the said contract of the sixth of September, A. D. 1853; it is hereby agreed between the parties hereto, that the said Charles S. Clark shall be, and he is hereby released from the said contract; and that the name of said Clark, wherever it occurs either in the said contract or in this instrument, be erased so as to make said contract and this instrument to read and be a contract between William S. Moss, Smith Frye, and Charles Greenleaf, and Ransom Gardner, George Goss, and Moses M. Jackman; and that in any suit upon said contract or on this instrument by either of the parties hereto, it shall not be necessary to mention the name of said Clark in any of the pleadings, and no objection shall be taken for not mentioning his name.

In witness whereof, we have hereunto interchangeably set our hands and seals, this twenty-eighth day of February, A. D. 1854.

WM. S. MOSS, [SEAL.]
By SMITH FRYE.
SMITH FRYE, [SEAL.]
CHAS. GREENLEAF, [SEAL.]
RANSOM GARDNER, [SEAL.]
GEORGE GOSS, [SEAL.]
By R. GARDNER. [SEAL.]
MOSES M. JACKMAN. [SEAL.]

Plaintiffs then offered evidence tending to prove that they commenced work under said contract of the 6th of September, 1853, and continued to prosecute the work on the ten sections on said railroad in said contracts mentioned, until the 14th day of August, A. D. 1854, and that on that day they abandoned and quit said work, leaving it in an unfinished condition, and a large amount of the work named in this contract undone; also, that in making up the monthly estimates of excavation done, the engineers of the railroad company did not make measurements, but jumped at the results without remeasurements from month to month.

That defendants employees, at different times, in laying the track on the road, put in ties which had been rejected by the engineers as unfit, amounting in all to some 400 or 500.

That the engineers altered the grade of the road at several

different points, in such manner as to make it more expensive to plaintiffs to do the work.

That they in some instances rejected ties which were suitable, and conformed to the requisites of the contract in that behalf.

That the plan of the culverts and cattle-guards were in some instances altered as the work progressed, so as to cause a considerable waste of timber which had been got out according to the first plans.

That after the July 20th, 1854, and before the abandonment of the work, plaintiffs furnished some 900 ties, and did work in excavation amounting to about $225.

That in June, plaintiffs have furnished 12,001 ties, which were lying on and near the track on that part of the road south of Moss's land, and that in July the ties from that point north were counted, and amounted to 8,589.

That Jackman, one of the defendants, in conversation with Mr. Wheaton, the resident engineer upon the road, told him he must be careful and not permit Mr. Romanger, an assistant engineer, to estimate such fence as he had estimated as good; that it would not do to accept such fence, for it would be thrown out in the final estimates.

Here plaintiffs offered to read in evidence each of the following papers, having first proven each of them to be in the handwriting of some one of the clerks or assistans attached to the engineer's office, and made under the directions of the engineers. The said papers having been referred to by various witnesses as the estimates of the engineers, and they (among others, the assistant engineers themselves) having been examined as to the statements therein contained, the court allowed the papers to be read to the jury in connexion with the evidence of the witnesses and as explanatory thereof. To the reading of each of which respectively defendants objected. The court overruled the objection and admitted the papers to be read in evidence, and defendants excepted to each of said decisions at the time when it was made.

The said papers so read in evidence were as follows:

First estimate for June, 1854, *Moss, Frye, & Co., Contractors.*

	Sec. 1.			
8	acres clearing - -	20	160 00	
22,400	cubic yards earth exc. -	16½	3,696 00	
47	mile grubbing - -	300	141 00	
834	feet b. m. timber - -	15	12 51	
				4,009 51
	Sec. 2.			
11	acres clearing - -	20	220 00	
63	mile grubbing - -	300	189 00	
25,900	cubic yards earth exc. -	16½	4,273 50	
8,280	feet b. m. timber - -	15	124 20	
1,480	cross ties - - -	35	518 00	
				5,324 70
	Sec. 3.			
20	acres clearing - -	20	400 00	
70	mile grubbing - -	300	210 00	
61,700	cubic yards earth exc. -	16½	10,186 50	
26,482	feet b. m. timber - -	15	397 23	
3,160	cross ties - - -	35	1,106 00	
				12,293 73
	Sec. 4.			
10	acres clearing - -	20	200 00	
23	mile grubbing - -	300	69 00	
24,000	cubic yards earth exc. -	16½	3,960 00	
13,568	feet b. m. timber - -	15	203 52	
3,380	cross ties - - -	35	1,183 00	
				5,615 52
	Sec. 5.			
9	acres clearing - -	20	180 00	
23	mile grubbing - -	300	69 00	
23,000	cubic yards earth exc. -	16½	3,795 00	
20,477	feet b. m. timber - -	15	307 15	
4,040	cross ties - - -	35	1,414 00	
				5,765 15
				33,008 61

Estimate for June, 1854, *Moss, Frye, & Co., contractors.*

Am't brought over - -	–	–	33,008 61
Sec. 6.			
4 acres clearing - -	20	80 00	
19 mile grubbing - -	300	57 00	
22,600 cubic yards earth exc. -	16½	3,729 00	
17,084 feet b. m. timber - -	15	256 26	
4,200 cross ties - - -	35	1,470 00	
80 rods fence - - -	1	80 00	
			5,672 26
Sec. 7.			
55 acres clearing - -	20	110 00	
50 mile grubbing - -	300	150 00	
12,000 cubic yards earth exc. -	16½	1,980 00	
40 rods fence - - -	1	40 00	
2,150 cross ties - - -	35	752 56	
			3,032 50
Sec. 8.			
3 acres clearing - -	20	60 00	
06 mile grubbing - -	300	18 00	
14,600 cubic yards earth exc. -	16½	2,409 00	
30 cross ties - - -	35	10 50	
			2,497 50
Sec. 9.			
3,800 cubic yards earth exc. -	16½	627 00	
84 cross ties - - -	35	29 40	
			656 40
Sec. 10.			
8,000 cubic yards earth exc. -	16½	1,320 00	
270 cross ties - - -	35	94 50	
			1,414 50
			13,273 16
Whole amount - - -	–	–	46,281 77
Whole amount - - -	–	–	46,281 77
Former estimate - -	–	–	41,751 88
Present " - -	–	–	4,529 89
Per centage retained - -	–	–	905 97
Am't due - - - -	–	–	$3,623 92

The second paper was as follows:

APRIL ESTIMATE, 1854.

Sec. 1.

25 chs. grubbing.
12,250 c. yds. of earth exc.

Sec. 2.

25,000 c. yds. earth exc.
2,232 ft. b. m. timber laid in bridges.
5,000 " " delivered.
600 ties.

Section 3.

47,850 c. yds. e. ex.
1,040 ties.
15,000 ft. b. m. delivered.

Section 4.

22,133 c. y. earth ex.
10,700 ft. b. m. delv'd.
2,800 ties.

Section 5.

17,370 c. y. e. ex.
19,500 ft. b. m. delivered.
3,885 ties.

Section 6.

18,000 c. yds. e. ex.
16,000 ft. b. m. delv'd.
3,550 ties. "

Third paper was as follows:

NOVEMBER ESTIMATE, 1853.

Section No. 1.

6 acres clearing.
22 chains grubbing.
9,300 cub. yds. earth exc.

Section No. 2.

6 acres clearing.
25 chains grubbing.
17,000 cub. yds. earth exc.

Section No. 3.

15 acres clearing.
195 chains grubbing.
300 cub. yds. earth exc.
34 cross ties.

Section No. 4.

8 acres clearing.
12 chains grubbing.
4,000 cub. yds. earth exc.
80 cross ties.

Section No. 5.

7 acres clearing.
2,000 cross ties.

Section No. 6.

3 acres clearing.
2,500 cub. yds. exc.
3,300 ft. b. m. timber delivered.

Section No. 7.

4 acres clearing.
6 chains grubbing.
2,000 cub. yds. earth exc.

Section No. 8.

1 acre clearing.
2,500 cub. yds. earth exc.

Section No. 9.

2,500 cub. yds. earth exc.

Section No. 10.

4,500 cub. yds. earth exc.

The fourth paper was as follows:

JUNE MONTHLY ESTIMATE.

Section 1.

8 acres clearing.
25 chains grubbing.
22,400 cub. yds. earth excavation.
400 " " in culverts pits.
5,411 " stone foundation.
5,899 " dry masonry.
10,830 " cement.

522,600 ft. b. m. timber and plank in work.
700 " " framed.
600 cross ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
25,900 cub. yds. earth excavation.
170 " " in culvert pits.
3,585 " stone foundation.
1,225 " dry masonry.
3,725 " cement.
13,032 ft. b. m. timber and plank in work.
778 cross ties in track.
102 " delivered.

Sec. 3.

20 acres clearing.
37 chains grubbing.
61,700 cub. yds. earth excavations.
400 " " in culvert pits.
3,433 " stone foundation.
8,726 " dry masonry.
3,550 " protection wall.
21,678 ft. b. m. timber and plank in work.
668 " " delivered.
10,000 " " for crossings delivered.
2,360 cross ties in track.
800 " delivered.

Sect. 4.

10 acres clearing.
12 chains grubbing.
24,000 cub. yds. earth excavation.
18,800 ft. b. m. timber in work.
3,380 cross ties delivered.

Sect. 5.

9 acres clearing.
12 chains grubbing.
23,000 cub. yds. earth excavation.
22,285 ft. b. m. timber and plank in work.
4,040 cross ties.

Sect. 6.

4 acres clearing.
10 chains grubbing.
22,600 cub. yds. earth excavation.

25,720 ft. b. m. timber and plank in work.
551 line ft. of piles d'livered.
4,200 cross ties.
80 rods fence.

The fifth paper was as follows:

Sec. 1.

8 acres clearing.
24 chains grubbing.
10,600 cub. yds. exc.
25 cross ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
24,000 cub. yds. exc.
4,000 ft. b. m. timber delivered.
580 cross ties.

Sec. 3.

20 acres clearing.
37 chains grubbing.
32,500 cub. yds. exc.
3,300 ft. b. m. timber delivered.
740 cross ties.

Sec. 4.

10 acres clearing.
12 chains grubbing.
19,500 cub. yds. exc.
7,000 ft. b. m. timber delivered.
2,300 cross ties.

Sec. 5.

9 acres clearing.
10 chains grubbing.
9,000 cub. yds. exc.
12,000 ft. b. m. timber delivered.
3,600 cross ties.

Sec. 6.

4 acres clearing.
10 chains grubbing.
12,000 cub. yds. exc.
15,000 ft. b. m. timber delivered.
2,800 cross ties.

Sec. 7.

4 acres clearing.
20 chains grubbing.
9,000 cub. yds. exc.
1,000 cross ties.

Sec. 8.

1 acre clearing.
3 chains grubbing.
4,200 cub. yds. earth exc.

Sec. 9.

3,600 cub. yds. exc.

Sec. 10.

6,500 cub. yds. exc.

The sixth paper was as follows:

P. & B. V. R. R.

DECEMBER ESTIMATE, SEC. 1 TO 11.

Sec. 1.

7 acres clearing.
24 chains grubbing.
10,600 cub. yds. excavation.

Sec. 2.

6 acres clearing.
32 chains grubbing.
19,000 cub. yds. excavation.
400 ft. b. m. timber and plank in work.
700 " " delivered.

Sec. No. 3.

16 acres clearing.
28 chains grubbing.
10,200 cub. yds. excavation.
34 cross ties.

Sec. No. 4.

9 acres clearing.
12 chains grubbing.
7,800 cub. yds. excavation.
800 cross ties.

Sec. 5.

8 acres clearing.

5,600 cub. yds. excavation.
5,000 ft. b. m. timber delivered.
3,000 cross ties.

Sec. 6.

3 acres clearing.
8 chains grubbing.
6,600 cub. yds. excavation.
10,000 ft. b. m. timber delivered.
1,200 cross ties.

Sec. 7.

35 acres clearing.
5 chains grubbing.
8,000 cub. yds. earth excavation.

Sec. 8.

1 acre clearing.
3 chains grubbing.
3,300 cub. yds. excavation.

Sec. 9.

3,600 cub. yds. excavation.

Sec. 10.

6,500 cub. yds. excavation.

EDWARD HUDSON.

The seventh paper was as follows:

QUANTITIES. PRICE. AMT. AMT. AMT.

Sec. 1.

8 acres clearing.
24 chains grubbing.
16,600 cub. yds. excavation.
25 ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
20,250 cub. yds. exc.
4,000 ft. b. m. timber delivered.
400 " " in work.
60 ties.

Sec. 3.

20 acres clearing.
37 chains grubbing.

20,200 cub. yds. excavation.
40 ties.

Sec. 4.

10 acres clearing.
12 chains grubbing.
11,800 cub. yds. excavation.
2,000 ft. b. m. timber delivered.
1,900 ties.

Sec. 5.

9 acres clearing.
10 chains grubbing.
9,000 cub. yds. excavation.
12,000 ft. b. m. timber delivered.
3,600 cross ties.

Sec. 6.

4 acres clearing.
10 chains grubbing.
9,000 cub. yds. excavation.
15,000 ft. b. m. timber delivered.
2,100 cross ties.

Sec. 7.

4 acres clearing.
20 chains grubbing.
9,000 cub. yds. excavation.

Sec. 8.

1 acre clearing.
3 chains grubbing.
4,200 cub. yds. earth excavation.

Sec. 9.

3,600 cub. yds. earth exca.

Sec. 10.

6,500 cub. yds. excavation.

EDWARD HUDSON.

The eighth paper was as follows:

MONTHLY ESTIMATE, 1854.

Sec. No. 1.

8 acres clearing.
25 chains grubbing.

10,600 cub. yds. exc.
25 cross ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
25,000 cub. yds. exc.
2,232 ft. b. m. timber in work.
4,700 " " delivered.
580 cross ties.

Sec. No. 3.

20 acres clearing.
37 chains grubbing.
38,500 cub. yds. exc.
8,300 ft. b. m. timber dlv'd.
940 cross ties.

Sec. 4.

10 acres clearing.
12 chains grubbing.
21,000 cub. yds. exc.
8,000 ft. b. m. timber dlv'd.
2,650 cross ties.

Sec. 5.

9 acres clearing.
10 chains grubbing.
11,000 cub. yds. exc.
12,000 b. m. timber dlv'd.
3,600 cross ties.

Sec. 6.

4 acres clearing.
10 chains grubbing.
15,000 cub. yds. exc.
480 lein ft. piles.
17,000 ft. b. m. timber dlv'd.
3,000 cross ties.

Sec. 7.

4 acres clearing.
20 chains grubbing.
9,000 cub. yds. exc.
125 len ft. piles d'ivered.
4,000 ft. b. m. timber dlv'd.
1,400 cross ties.

Sec. 8.

1 acre clearing.
3 chains grubbing.
5,000 cub. yds. exc.

Sec. 9.

3,600 cub. yds. exc.
84 cross ties.

Sec. 10.

6,500 cub. yds. exc.

HUDSON.

The ninth paper was as follows:

Sec. No. 1.

8 acres clearing.
25 chains grubbing.
17,800 cub. yds. earth excavation.
1,000 ft. b. m. timber delivered.
600 ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
25,000 cub. yds. exc.
7,232 ft. b. m. timber delivered.
600 cross ties.

Sec. 3.

20 acres clearing.
37 chains grubbing.
57,200 cub. yds. exc.
16,950 ft. b. m. timber delivered.
1,360 cross ties.

Sec. 4.

10 acres clearing.
12 chains grubbing.
22,750 cub. yds. exc.
11,100 ft. b. m. timber delivered.
3,380 ties.

Sec. 5.

9 acres clearing.
12 chains grubbing.
21,600 cub. yds. exc.
19,500 ft. b. m. timber delivered.
4,000 ties.

Sec. 6.

4 acres clearing.
10 chains grubbing.
20,800 cub. yds. exc.
21,786 ft. b. m. timb. delivered.
4,200 ties.
80 rods fence.

Sec. 7.

5 acres clearing.
22 chains grubbing.
4,900 cub. yds. exc.
10,220 fet. b. m. timber delivered.
40 rods fence.
2,150 ties.

Sec. 8.

1 acre clearing.
3 chains grubbing.
11,300 yds. exc.
5,300 fet. b. m. timb. delivered.
30 cross ties.

Sec. 9.

3,800 cub. yds. exc.
2,600 fet. b. m. timber and plank delivered.
84 ties.

Sec. 10.

6,500 cub. yds. exc.
270 ties.

The tenth paper was as follows:

PEORIA AND BUREAN VALLEY RAILROAD.

ESTIMATE JUNE 19, 1854.

Section No. 1.

8 acres clearing.
25 chains grubbing.
22,400 cub. yds. earth ex.
846 fet. b. m. timber.
600 cross ties.

Section 2.

11 acres clearing.
33 chains grubbing.
25,900 cub. yds. earth exc.

Sec. 8.

1 acre clearing.
3 chains grubbing.
5,000 cub. yds. exc.

Sec. 9.

3,600 cub. yds. exc.
84 cross ties.

Sec. 10.

6,500 cub. yds. exc.

HUDSON.

The ninth paper was as follows:

Sec. No. 1.

8 acres clearing.
25 chains grubbing.
17,800 cub. yds. earth excavation.
1,000 ft. b. m. timber delivered.
600 ties.

Sec. 2.

11 acres clearing.
33 chains grubbing.
25,000 cub. yds. exc.
7,232 ft. b. m. timber delivered.
600 cross ties.

Sec. 3.

20 acres clearing.
37 chains grubbing.
57,200 cub. yds. exc.
16,950 ft. b. m. timber delivered.
1,360 cross ties.

Sec. 4.

10 acres clearing.
12 chains grubbing.
22,750 cub. yds. exc.
11,100 ft. b. m. timber delivered.
3,380 ties.

Sec. 5.

9 acres clearing.
12 chains grubbing.
21,600 cub. yds. exc.
19,500 ft. b. m. timber delivered.
4,000 ties.

Sec. 6.

4 acres clearing.
10 chains grubbing.
20,800 cub. yds. exc.
21,786 ft. b. m. timb. delivered.
4,200 ties.
80 rods fence.

Sec. 7.

5 acres clearing.
22 chains grubbing.
4,900 cub. yds. exc.
10,220 fet. b. m. timber delivered.
40 rods fence.
2,150 ties.

Sec. 8.

1 acre clearing.
3 chains grubbing.
11,300 yds. exc.
5,300 fet. b. m. timb. delivered.
30 cross ties.

Sec. 9.

3,800 cub. yds. exc.
2,600 fet. b. m. timber and plank delivered.
84 ties.

Sec. 10.

6,500 cub. yds. exc.
270 ties.

The tenth paper was as follows:

PEORIA AND BUREAN VALLEY RAILROAD.

ESTIMATE JUNE 19, 1854.

Section No. 1.

8 acres clearing.
25 chains grubbing.
22,400 cub. yds. earth ex.
846 fet. b. m. timber.
600 cross ties.

Section 2.

11 acres clearing.
33 chains grubbing.
25,900 cub. yds. earth exc.

8,280 fet. b. m. timber.
778 cross ties in track.
102 " delivered.

Section 3.

20 acres clearing.
37 chains grubbing.
61,700 cub. yds. earth ex.
16,482 fet. b. m. timber.
10,000 fet. " plank, for road crossing.
2,360 cross ties in track.
800 " delivered.

Section 4.

10 acres clearing.
12 chains grubbing.
24,000 cub. yds. earth exc.
13,572 fet. b. m. timber.
3,380 cross ties delivered.

Section 5.

9 acres clearing.
12 chains grubbing.
23,000 cub. yds. earth ex.
20,477 fet. b. m. timber.
4,040 cross ties.

Section 6.

4 acres clearing.
10 chains grubbing.
22,600 cub. yds. earth exc.
17,000 feet. b. m. timber, &c.
4,200 cross ties.
80 rods fence.

Section 7.

55 acres clearing.
26 chains grubbing.
12,000 cub. yds. earth ex.
4,920 feet b. m. timber, &c.
2,416 delivered.
2,150 cross ties.

Section 8.

3 acres clearing.
3 chains grubbing.
14,600 cub. yds. earth exc.
9,300 feet b. m. timber, &c.

599 rods fence.
30 cross ties.

Section 9.

3,800 cub. yds. earth ex.
10,000 feet b. m. timber, &c.
903 rods fence.
84 cross ties.

Section 10.

8,000 cub. yds. earth ex.
3,200 feet b. m. timber, &c.
270 cross ties.

Plaintiffs offered further evidence tending to prove, that in December, 1855, all the clearing in said contracts named was done, and amounted to 9,991 acres, embracing the clearing or removal of certain trees of an orchard of apple and peach trees through which the line of the road ran.

That after the 20th July, 1854, plaintiffs delivered about 5,000 feet of timber.

That the whole amount of ties delivered by plaintiffs amounted to about 27,000.

That the grubbing on the road was nearly completed, all except a few points on the edges and an occasional stump.

That the change of grade from time to time had been a disadvantage to plaintiffs to about the amount of three hundred and seventy-five dollars.

That about 732 rods of fence had been built on and near the line of the strip of railroad land on which the road was built, the same having been constructed along places where the road was being constructed through fields, and that about half of this was built by Moss, one of the plaintiffs, through his own farm. In relation to this fence, a question arose as to whether it was built under the contracts given in evidence, and whether defendants could be charged with the same, and whether it ought to have been embraced in the estimates; and plaintiffs offered to prove that the railroad company has since that time connected their other fences thereto, and that said fences were used by the said railroad company. To this proof defendants objected. The court overruled the objections of defendants, and admitted the proof, to which decision defendants excepted. [But after this, full proof was given by witnesses who examined and measured the fence, and testified to its value after the trial commenced; and after this, proof was offered and the point decided, so that in reality it became immaterial. This is mentioned because the bill of exceptions does not purport to give all the testimony in the case.]

Plaintiffs further produced a letter, [which was proved to be genuine and to have been delivered to William Jarvis, the chief engineer of said railroad company, on the 11th day of January, 1854,] and offered to read the same in evidence; which letter was in the words and figures following, viz:

WILLIAM JARVIS, esq.,
Engineer Peoria and Burean Valley Railroad:

SIR: The undersigned contractors, with Ransom Gardner, George Goss, and Moses M. Jackman, for grading, clearing, grubbing, furnishing timber for bridges and culverts, cross ties, &c., for the construction of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the Peoria and Burean Valley Railroad, respectfully represent, that the engineer employed to make estimates, &c., on said road has fraudulently refused and neglected to make true and proper estimates of work done and materials delivered by the undersigned, so as to enable them to prosecute said work advantageously, but has *withheld* by his false and fraudulent estimates a large amount of money, at *least* the sum of twelve thousand dollars, which ought to have been paid by said Gardner, Goss, & Jackman to the undersigned under their said contract. They therefore request you to make or cause to be made a true and correct estimate of the work done and materials furnished by them under said contract.

PEORIA, *January* 11th, 1854.

WM. S. MOSS,
SMITH FRYE,
CHARLES GREENLEAF,
CHARLES S. CLARK.

To the reading of which paper in evidence the defendants objected, and insisted that the same was incompetent; and among other things suggested, that by the contract of 28th of February, 1854, all prior known causes of complaint (if any) were waived. The court overruled defendants objections, and permitted the same to be read in evidence, and it was read in evidence to the jury, [among other reasons, as a part of the transaction between the parties, it being brought hence to the defendants, and to show that prior to the contract of Feb. 28, 1854, complaint had been made of improper estimates, and that that fact was known to the defendants;] to which decision of the court in admitting said paper in evidence the defendants excepted when the same was made.

Plaintiffs then offered in evidence a letter, which was shown to have been delivered to Mr. Jackman, of *of* defendants, on the 17th day of Jan., 1854; which letter was in the words and figures following, to wit:

PEORIA, *January* 11*th*, 1854.

Messrs. RANSOM GARDNER, GEORGE GOSS, MOSES M. JACKMAN:

You are notified that the undersigned, contractors with you for grading, clearing, grubbing, furnishing timber for bridges and culverts, cross ties, &c., for the construction of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the Peoria and Burean Valley Railroad are dissatisfied with the estimates made to them by the resident engineer of said road for work done and materials furnished on the same; that the estimates of said engineer are false and fraudulent, and that by the same at least the sum of twelve thousand dollars, money which the undersigned ought under their contracts with you to have received in order to enable them to prosecute said work advantageously, is withheld from them. This is therefore to notify you, that unless you cause a true and proper estimate of our said work and materials to be made, and forthwith pay what may be due on such estimate under our contracts, that we will procure a measurement and estimate to be made, and hold you responsible for whatever may be due as under the contracts, and for such damages as we may sustain by reason of your violation thereof, and take such other steps in relation to said contract and work as we shall deem it for our best interests to pursue.

WM. S. MOSS,
SMITH FRYE,
CHARLES GREENLEAF,
CHARLES S. CLARK,
By their attorneys,
J. MANNING & PURPLE, & SANGER.

To the introduction of which, defendants by their counsel objected. The court overruled the defendants objection, and admitted the evidence, [on the same ground as the last;] to which decision of the court the defendants excepted, and the same was read in evidence to the jury.

Plaintiffs then offered in evidence the following notice, which was shown to be genuine, and to have been delivered to defendants on the day of its date, viz:

Messrs. GOSS, JACKMAN, & Co.:

We will proceed to finish up the grading, grubbing, and clearing mentioned in our contract with you on sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the Peoria and Burean Valley Railroad, according to our contracts heretofore made, provided you will agree in writing to pay us for said work the prices stipulated in said contracts, with all the reserved per centage not yet paid for the same, together with the extra work done by us on

said sections. If you decline doing this, we shall treat the whole contract as abandoned by us on account of failure to comply on your part, and shall hold you responsible for all the work done and materials furnished by us.

Signed MOSS, FRYE, & Co.,
Per SMITH FRYE.

PEORIA, *Aug.* 14*th*, 1854.

To the reading of which in evidence defendants objected. The court overruled the objections, and defendants excepted, and the paper was read in evidence to the jury.

Plaintiffs then offered evidence tending to prove that between the 20th of July, 1854, and the 12th of August, 1854, plaintiffs furnished plank to defendants under said contract to the amount of about 5,600 feet, board measure.

To the *admissibility* of which evidence and its competency defendants objected. The court overruled the objections of defendants, and the evidence was admitted and given to the jury; to which decision of the court in admitting said testimony, the defendants excepted at the time it was made.

Plaintiffs then offered in evidence a certified copy of writ of injunction, which is set out hereinafter; to the reading of which defendants objected, and insisted that it should first be proven that to have progressed with the work on the railroad under the contract would have been within the inhibition of the injunction. The court overruled the objection, and allowed the injunction to be read to the jury, and then bring evidence as to the plaintiffs being delayed and put to expense by the injunction; left it to the jury to decide upon the facts proved within the locality mentioned by the witnesses, was on the same *tract* of land as that described in the writ. To this defendants excepted.

The following is the copy of said writ of injunction read in evidence as aforesaid, viz:

STATE OF ILLINOIS,
Peoria county, ss.

The people of the State of Illinois to the Peoria and Burean Valley Railroad Company, its agents, officers, and servants, greeting:

Whereas William H. Haskell has exhibited his bill of complaint in the circuit court in and for the county of Peoria, in the State of Illinois, on the chancery side thereof, against the Peoria and Burean Valley Railroad Company, wherein, among other things, it is alleged that the said Peoria and Burean Valley Railroad Company threaten and intend to alter and change the grade of Water street, in the city of Peoria, in the con-

struction of their railroad therein, which tends to the injury of the complainant, as set forth in said bill of complaint. Now, therefore, in consideration of the premises, we do strictly enjoin and command the said Peoria and Burean Valley Railroad Company, and their agents, officers, and servants, that they do absolutely and entirely desist from fixing the grade of its railroad over and upon Water street and the levee along the bank of the Illinois river, within the city of Peoria, and from making and constructing its said railroad over and upon said Water street and levee, on or at a grade in any way or manner different from the grade fixed and ordered by said city, by the city council, by ordinance passed for that purpose, until further order of said court. Hereof fail not, under penalty of what the law directs.

Witness Jacob Gale, clerk of said court, and the seal thereof, at Peoria, this thirteenth day of June, A. D. 1854.

[L. S.]

JACOB GALE, *Clerk.*

To the sheriff of Peoria county to execute.

STATE OF ILLINOIS,
Peoria county, ss.

I hereby certify and return that I served the within writ by reading the same to Smith Frye, William S. Moss, Charles Greenleaf, W. H. Wheadon, and Isaac Underhill, and also by pointing out to each the seal of our circuit court thereunto attached.

June 13th, 1854.

L. B. COMWELL,
Sheriff P. C., Ills.

And afterwards, to wit, on the 9th day of August, A. D. 1854, I served this writ on Washington Cockle by reading.

L. B. COMWELL,
Sheriff P. C., Ills.

STATE OF ILLINOIS,
Peoria county ss.

I, Jacob Gale, clerk of the circuit court in and for the county of Peoria, in the State of Illinois, do hereby certify that the foregoing is a full and correct copy of a writ of injunction, and the return of the sheriff of Peoria county thereto, endorsed thereon in a cause in chancery in said circuit court of William H. Haskell, complainant, against the Peoria and Burean Valley Railroad Company, defendant, as the same remains on file in my office.

In witness whereof, I hereto set my hand and seal of said circuit court, at Peoria, this 22d day of January, A. D. 1856.

[L. S.]

JACOB GALE, *Clerk.*

[There was evidence given by the plaintiffs which they insisted tended to establish that the defendants had violated their contract in various respects, and also evidence which they insisted tended to show that the plaintiffs had done work to a large amount above what they had received pay for. This is stated because the bill of exceptions does not purport to give all the evidence.] Defendants then moved the court for a non suit, which the court overruled, and defendants excepted to said decision.

Defendants then produced monthly estimates of the engineers of said railroad, being estimates made monthly of the amount of the various kinds of materials furnished and work done upon said railroad, from the beginning of said work to the 20th day of the month, for which the estimates severally were made, viz: the estimates for the months of September, October, November, December, of 1853, and of the months of January, February, March, April, May, June, and July, 1854, and read the same in evidence to the jury. Each of the estimates was prepared after the same plan, and each contained the matter embraced in the estimate of the month next preceeding it, and such additional work done and materials furnished between the taking of the preceeding estimate and the then estimate.

The following is a copy of so much of the February estimate aforesaid as has any relation to the ten sections embraced in contracts, read in evidence by plaintiffs:

Peoria and Burean Valley Railroad.
ESTIMATE FEBRUARY 28th, 1854.

Quantities.	Price.	Amount.	
Section No. 1.			
8 acres clearing - - -	$25	$200 00	
24 chains grubbing - -	10	240 00	
10,600 cub. yds. earth exc. - -	20	2,120 00	
400 " in cul. pits. -	20	80 00	
4,411 " stone foundation	3	132 33	
69 " dry masonry -	4	276 00	
10,830 " cement - -	5	541 50	
25 cross ties - - - -	30	7 50	
			$3,597 33
Section No. 2.			
11 acres clearing - - -	25	275 00	
33 chains grubbing - -	10	330 00	
24,000 cub. yds. earth exc. - -	20	4,800 00	
110 " in culv. pits -	20	22 00	
3,585 " stone foundation	3	107 55	
4,225 " cement masonry	5	211 25	
4,000 fet. b. m. timber dlvd. -	20	80 00	
580 cross ties - - - -	30	174 00	
			5,999 80
			$9,597 13
			9,597 13
Section No. 3.			
20 acres clearing - - -	25	500 00	
37 chains grubbing - -	10	370 00	
32,500 cub. yds. earth exc. - -	20	6,500 00	
180 " in slope wall and culvert pits -	20	36 00	
3,433 " stone foundation	3	102 99	
81 " dry masonry -	4	324 00	
152 " protection wall -	2 50	380 00	
3,300 fet. b. m. timber dlvd. -	20	66 00	
740 cross ties - - - -	30	222 00	
			8,500 99
Section No. 4.			
10 acres clearing - - -	25	250 00	
12 chains grubbing - -	10	120 00	
19,500 cub. yds. earth exc. - -	20	3,900 00	
7,000 fet. b. m. timber dlvd. -	20	140 00	
2,300 cross ties - - - -	30	690 00	
			5,100 00

Quantities.	Price.	Amount.	
Section No. 5.			
9 acres clearing - - -	$25	$225 00	
10 chains grubbing - -	10	100 00	
9,000 cub. yds. earth exc. - -	20	1,800 00	
12,000 fet. b. m. timber dlvd. -	20	240 00	
3,600 cross ties - - - -	30	1,080 00	
			3,445 00
Section No. 6.			
4 acres clearing - - -	25	100 00	
10 chains grubbing - -	10	100 00	
12,000 cub. yds. earth exc. - -	20	2,400 00	
15,000 fet. b. m. timber dlvd. -	20	300 00	
2,800 cross ties - - - -	30	840 00	
			3,740 00
Section No. 7.			
4 acres clearing - - -	25	100 00	
20 chains grubbing - -	10	200 00	
9,000 cub. yds. earth exc. - -	20	1,800 00	
1,000 cross ties - - -	30	300 00	
			2,400 00
Section No. 8.			
1 acre clearing - - -	25	25 00	
3 chains grubbing - -	10	30 00	
4,200 cub. yds. earth exc. - -	20	840 00	
			895 00
Section No. 9.			
3,600 cub. yds. earth exc. - -	20	720 00	720 00
Section No. 10.			
6,500 cub. yds. earth exc. - -	20	1,300 00	1,300 00
			35,698 12

The following is a copy of so much of the March estimate aforesaid as has any relation to the ten sections embraced in the contracts read in evidence by plaintiffs, viz:

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Peoria and Burean Valley Railroad.

MONTHLY ESTIMATE MARCH 31st, 1854.

Quantities.	Price.	Amount.	Amount.
Sec. No. 1.			
8 acres clearing - - -	$25	200 00	
25 chains grubbing - -	10	250 00	
10,600 cub. yds. earth exc. - -	20	2,120 00	
400 " in culvert pits -	20	80 00	
5,411 " stone foundation - (as per settlement.)	3	162 33	
5,899 " dry masonry - (as per settlement.)	4	235 96	
10,830 " cement - (as per settlement.)	5	541 50	
25 cross ties - - - -	35	8 75	
			3,598 54
Section No. 2.			
11 acres clearing - - -	25	275 00	
33 chains grubbing - -	10	330 00	
25,000 cub. yds. earth exc. - -	20	5,000 00	
100 " in culvert pits -	20	22 00	
3,585 " stone foundation - (as per settlement.)	3	107 55	
1,225 " dry masonry - (as per settlement.)	4	49 00	
3,725 " cement - (as per settlement.)	5	186 25	
2,232 fet. b. m. timber in work -	30	66 96	
4,700 " " delivered	20	94 00	
580 cross ties - - - -	35	203 00	
			6,333 76
Section No. 3.			
20 acres clearing - - -	25	500 00	
37 chains grubbing - -	10	370 00	
38,500 cub. yds. earth exc. - -	20	7,700 00	
180 " in slope walls and culvert pit -	20	36 00	
3,433 " stone foundation - (as per settlement.)	3	102 99	
8,726 " dry masonry - (as per settlement.)	4	349 04	
152 " protection wall - (as per settlement.)	2 50	380 00	
8,300 ft. b. m. timber dlvd. -	2	166 00	
940 cross ties - - - -	35	329 00	
			9,933 03

Quantities.	Price.	Amount.	Amount.
Sec. No. 4.			
10 acres clearing - - -	$25	250 00	
12 chains grubbing - -	10	120 00	
21,000 cub. yds. earth exc. - -	20	4,200 00	
8,000 fet. b. m. timber dlvd. -	20	160 00	
2,650 cross ties - - - -	35	927 50	
			5,657 50
Section No. 5.			
9 acres clearing - - -	25	225 00	
10 chains grubbing - -	10	100 00	
11,000 cub. yds. earth exc. - -	20	2,200 00	
12,000 fet. b. m. timber dlvd. -	20	240 00	
3,600 cross ties - - - -	35	1,260 00	
			4,025 00
Sec. No. 6.			
4 acres clearing - - -	25	100 00	
10 chains grubbing - -	10	100 00	
15,000 cub. yds. earth exc. - -	20	3,000 00	
480 lin. fet. piles devr. - -	35	168 00	
17,000 fet. b. m. timber dlvd. -	20	340 00	
3,000 cross ties - - - -	35	1,050 00	
			4,758 00
Sec. No. 7.			
4 acres clearing - - -	25	100 00	
20 chains grubbing - -	10	200 00	
9,000 cub. yds. earth exc. - -	20	1,800 00	
125 lin. fet. piles dlvd. - -	20	25 00	
4,000 fet. b. m. timber dlvd. -	20	80 00	
1,400 cross ties - - - -	35	490 00	
			2,695 00
Sec. No. 8.			
1 acre clearing - - -	25	25 00	
3 chains grubbing - -	10	30 00	
5,000 cub. yds. earth exc. - -	20	1,000 00	
			1,055 00
Sec. No. 9.			
3,600 cub. yds. earth exc. - -	20	720 00	
84 cross ties - - - -	35	29 40	
			749 40
			38,805 23
			38,805 23
Sec. No. 10.			
6,500 cub. yds. earth exc. - -	20	1,300 00	1,300 00

The following is a copy of the July estimate aforesaid, so far as the same relates to the ten sections named in said contracts given in evidence by the plaintiffs:

Peoria and Burean Valley Railroad.

MONTHLY ESTIMATE JULY 31st, 1854.

Quantities.	Price.	Amount.	Amount.
Sec. No. 1.			
8 acres clearing - - -	$25	200 00	
27 chains grubbing - -	10	270 00	
28,000 cub. yds. earth exc. - -	20	5,600 00	
400 " in culvert pits -	20	80 00	
5,411 " stone foundations	3	162 33	
5,899 " dry masonry -	4	235 96	
10,830 " cement " -	5	541 50	
50 " stone delv'd -	1 50	75 00	
5,226 ft. b. m. timber and plank in work -	30	156 78	
700 " " framed -	25	17 50	
2,000 cross ties - - - -	35	700 00	
			8,039 07
Sec. No. 2.			
11 acres clearing - - -	25	275 00	
33 chains grubbing - -	10	330 00	
25,900 cub. yds. earth exc. - -	20	5,180 00	
170 " in culvert pits -	20	34 00	
3,585 " stone foundation	3	107 55	
1,225 " dry masonry -	4	49 00	
3,725 " cement " -	5	186 25	
13,032 ft. b. m. timber and plank in work - - -	30	390 96	
778 cross ties in track - -	40	311 20	
102 " delivered - -	35	35 70	
0,5 miles track laying - -	3 75	187 50	
			7,087 16
Sec. No. 3.			
20 acres clearing - - -	25	500 00	
37 chains grubbing - -	10	370 00	
61,700 cub. yds. earth exc. - -	20	12,340 00	
400 " in culvert pits -	20	80 00	
3,433 " stone foundation	3	102 99	
8,726 " dry masonry -	4	349 04	
480 " protection wall -	2 50	1,200 00	

Quantities.	Price.	Amount.	Amount.
21,678 ft. b. m. timber and plank in work - -	$30	650 34	
668 " delivered - -	25	280 00	
10,000 " plank for road crossings -	25	250 00	
3,100 cross ties in track - -	40	1,240 00	
189 miles track laying - -	3 75	708 75	
42 lbs. wrot. iron - - -	13	5 46	
			17,813 28
Sec. No. 4.			
10 acres clearing - - -	25	250 00	
12 chains grubbing - -	10	120 00	
24,300 cub. yds. earth exc. - -	20	4,860 00	
16,144 ft. b. m. timber in work -	30	484 32	
2,600 ties in track - - -	40	1,040 00	
800 " delivered - - -	35	280 00	
16 miles track laying - -	3 75	600 00	
			7,634 32
Sec. No. 5.			
9 acres clearing - - -	25	225 00	
12 chains grubbing - -	10	120 00	
23,000 cub. yds. earth exc. - -	20	4,600 00	
22,285 ft. b. m. timber and plank in work - - -	30	668 55	
4,040 cross ties - - - -	35	1,414 00	
			7,027 55
			47,601 38
			47,601 38
Sec. No. 6.			
4 acres clearing - - -	25	100 00	
10 chains grubbing - -	10	100 00	
22,600 cub. yds. earth exc. - -	20	4,520 00	
25,720 ft. b. m. timber and plank in work - - -	30	771 60	
551 lin. ft. piles delivered -	35	192 85	
4,200 cross ties - - - -	35	1,470 00	
80 rods fence - - -	1 25	100 00	
			7,254 45
Sec. No. 7.			
55 acres clearing - - -	25	137 50	
26 chains grubbing - -	10	260 00	
12,850 cub. yds. earth exc. - -	20	2,570 00	

Quantities.	Price.	Amount.	Amount.
4,920 ft. b. m. timber and plank in work -	$30	147 60	
7,600 " " - - -	25	190 00	
500 lin. ft. piles de'ivered -	35	175 00	
40 rods fence - - -	1 25	50 00	
2,150 cross ties - - - -	35	752 50	
			4,282 60
Sec. No. 8.			
3 acres clearing - - -	25	75 00	
3 chains grubbing - -	10	30 00	
16,000 cub. yds. earth exc. - -	20	3,200 00	
3,000 ft. b. m. timber and plank in work - -	30	90 00	
7,500 " framed - -	25	187 50	
599 rods fence - - -	1 25	748 75	
30 cross ties - - - -	35	10 50	
			4,340 75
			$ 63,480 18
Sec. No. 9.			$ 63,480 18
3,800 cub. yds. earth exc. - -	20	760 00	
9,650 ft. b. m. timber and plank furn'd -	25	241 25	
1,600 " dlvd. -	20	32 00	
903 rods fence - - -	1 25	1,128 75	
84 cross ties - - - -	35	29 40	
			2,191 40
Sec. No. 10.			
8,217 cub. yds. earth exc. - -	20	1,643 40	
4,100 ft. b. m. timber & plank f'd -	25	102 50	
2,900 " " dlvd.	20	58 00	
270 cross ties - - - -	35	94 50	
			1,898 40

Defendants called as a witness Charles Warner, who testified that he was the clerk of defendants and kept their books, accounts and files relating to the building that railroad, from August, 1853 to January, 1855. The witness then was shown the monthly estimates which defendants had read in evidence, as aforesaid, beginning with September, 1853, and embracing each month consecutively to the July estimate, 1854. Witness then testified that these monthly estimates were furnished to him from the engineer's office, from time to time, monthly,

as the estimates of the engineers of the amount of work done on these ten sections. Witness here stated that from those estimates of the engineers, he, as the clerk of the defendants, prepared monthly estimates from time to time for the plaintiffs of the work done and materials furnished by them under their contract, and of the amount to be paid to them by defendants under the contract upon the quantities mentioned therein. Witness, at the request of the defendants, here produced copies of the estimates so prepared by him for the plaintiffs, and they were read to the jury as follows, viz:

Peoria and Burean Valley Railroad.

ESTIMATE SEPTEMBER 30, 1853.

Goss, Jackman, & Co.

To Moss, Frye, & Co.

Quantities.	Price.	Amount.	Amount.
Section 1.			
721 acres clearing, a - -	20	144 20	
14 mile grubbing, a - -	3 00	42 00	
3,130 cubic yds. excavation, a -	1 65	516 45	
			702 65
Section 2.			
1,022 acres clearing, a - -	20	204 40	
13 mile grubbing, a - -	3 00	39 00	
4,160 cubic yds. excavation, a -	1 65	686 40	
			929 80
Section 3.			
2,296 acres clearing, a - -	20	459 20	459 20
Section 4.			
1,102 acres clearing, a - -	20	220 40	220 40
Section 5.			
826 acres clearing, a - -	20	165 20	165 20
Section 6.			
0,69 acres clearing, a - -	20	13 80	13 80
Whole amount - -	–	–	$2,491 05
Less 20 per cent. -	–	–	498 21
Amount due - -	–	–	$1,992 84

Received payment by the hand of M. M. Jackman.

Estimate for October, 1853, *P. & B. V. Railroad.*

Moss, Frye, & Co., Contractors.

Sec. 1.			
4 acres clearing - - -	20	80 00	
40 mile grubbing - - -	3 00	120 00	
8,800 cub. yds. earth exc. - -	16½	1,452 00	
			1,652 00
Section 2.			
5 acres clearing - - -	20	100 00	
30 mile grubbing - - -	3 00	90 00	
10,000 cubic yds. earth exc. -	16½	1,650 00	
			1,840 00
Sec. 3.			
2,296 acres clearing - - -	20	459 20	
03 mile grubbing - - -	3 00	9 00	
500 cubic yds. earth exc. -	16½	82 50	
			550 70
Sec. 4.			
1,102 acres clearing - - -	20	220 40	220 40
Sec. 5.			
826 acres clearing - - -	20	165 20	165 20
Sec. 6.			
2 acres clearing - - -	20	40 00	40 00
Sec. 9.			
1,000 cub. yds. earth exc. - -	16½	165 00	165 00
Whole amount - - - - -	–	–	4,633 30
Former estimate - - - -	–	–	2,491 05
Present " - - - - -	–	–	2,142 25
Per centage retained - - -	–	–	428 45
Amounts due - - - - -	–	–	1,713 80
Amount due as per estimate -	–	–	1,713 80
Amount of cash advanced - -	–	500	
" collected on bill of tools	–	411 02	
" cash paid as per receipt	–	802 78	
			$1,713 80

Peoria and Burean Valley Railroad.

ESTIMATE FOR NOVEMBER, 1853, MOSS, FRYE, & CO., CONTRACTORS.

Section 1.				
6 acres clearing - - -	20		120 00	
41 mile grubbing - - -	3 00		123 00	
9,300 cub. yds. earth exc. - -		16½	1,534 50	
				1,777 50
Section 2.				
6 acres clearing - - -	20		120 00	
50 mile grubbing - - -	3 00		150 00	
17,000 cub. yds. earth exc. - -		16½	2,805 00	
400 f't b. m. timber in con't -		25	10 00	
				3,085 00
Section 3.				
15 acres clearing - - -	20		300 00	
33 mile grubbing - - -	3 00		99 00	
3,000 cub. yd's earth exc. - -		16½	495 00	
34 cross ties - - - -		30	10 20	
				904 20
Section 4.				
8 acres clearing - - -	20		160 00	
22 mile grubbing - - -	3 00		66 00	
4,000 cub. yds. earth exc. - -		16½	660 00	
80 cross ties - - - -		30	24 00	
				910 00
Section 5.				
7 acres clearing - - -	20		140 00	
2,000 cross ties - - - -	30		600 00	
				740 00
Am't forward		–	–	7,416 70
Am't bro't forward		–	–	7,416 70
Section 6.				
3 acres clearing - - -	20		60 00	
2,500 cub. yds earth exc. - -		16½	412 50	
3,300 ft. b. m. timber- - -		15	49 50	
800 cross ties				
				522 00
Sec. 7.				
4 acres clearing - - -		20	80 00	
12 mile grubbing - - -	3 00		36 00	
2,000 cub. yds. earth exc. - -		16½	330 00	
				446 00

Sec. 8.				
1 acre clearing - - -	20		20 00	
2,500 cub. yds. earth exc. - -		16½	412 50	
				432 50
Sec. 9.				
2,500 cub. yds. earth exc. - -		16½	412 50	412 50
Sec. 10.				
4,500 cub. yds. earth exc. - -		16½	742 50	742 50
				2,555 50
Whole amount -	–		–	9,972 20

Former estimate - - - - -		4,633 30
Present - - - - - - -		5,338 90
Per centage retained - - - -		1,067 78
Amount due - - - - - -		4,271 12
Cash advanced on ties, cr. -	240 00	
Balance due on tolls, cr. - -	11 84	
		251 84
Amount due - - -		4,019 28

Estimate for December, 1853, *P. & B. V. Railroad.*

MOSS, FRYE, & Co., CONTRACTORS.

Sec. 1.				
7 acres clearing - - -	20		140 00	
45 mile grubbing - -	3 00		135 00	
10,600 cub. yds. earth exc. - -		16½	1,749 00	
				2,024 00
Sec. 2.				
6 acres clearing - - -	20		120 00	
61 mile grubbing - -	3 00		183 00	
19,000 cub. yds. earth exc. - -		16½	3,135 00	
400 ft. b. m. timber in work -		25	10 00	
700 " " delivered -		15	10 50	
				3,458 50
Sec. 3.				
16 acres clearing - - -	20		320 00	
53 mile grubbing - -	3 00		159 00	

10,200 cub. yds. earth exc. - -		16½	1,683 00	
34 cross ties - - - -		30	10 20	
				2,172 20
Sec. 4.				
9 acres clearing - - -	20		180 00	
23 mile grubbing - -	3 00		69 00	
7,800 cub. yds. earth exc. - -		16½	1,287 00	
800 cross ties - - - -		30	240 00	
				1,776 00
Sec. 5.				
8 acres clearing - - -	20		160 00	
5,600 cub. yds. earth exc. - -		16½	924 00	
3,000 cross ties - - - -		30	900 00	
5,000 ft. b. m. timber - -		15	75 00	
				2,059 00
Amount carried fo'd - -	–		–	11,489 70
Amount bro't fo'd - -	–		–	11,489 70
Sec. 6.				
3 acres clearing - - -	20		60 00	
15 mile grubbing - -	3 00		45 00	
6,600 cub. yds. earth exc. - -		16½	1,089 00	
10,000 ft. b. m. timber - -		15	150 00	
1,200 cross ties - - - -		30	360 00	
				1,704 00
Sec. 7.				
35 acres clearing - - -	20		70 00	
10 mile grubbing - - -	3 00		30 00	
8,000 cub. yds. earth exc. - -		16½	1,320 00	
				1,420 00
Sec. 8.				
1 acres clearing - - -	20		20 00	
66 mile grubbing - - -	3 00		18 00	
3,300 cub. yds. earth exc. - -		16½	544 50	
				582 50
Section 9.				
3,600 cub. yds. earth exc. - -		16½	594 00	594 00
Section 10.				
6,500 cub. yds. earth exc. - -		16½	1,072 50	1,072 50
				5,373 00
Whole amount - - - -	–		–	16,862 70
Former estimate - - - -	–		–	9,972 20
Present " - - - -	–		–	6,890 50
Per centage retained - - -	–		–	1,378 10
Amount due - - - -	–		–	5,512 40

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Peoria and Burean Valley Railroad.

ESTIMATED FROM JANUARY, 1854.

Moss, Frye, & Co., Contractors.

Section 1.				
8 acres clearing - - -	20		160 00	
45 mile grubbing - - -	3 00		135 00	
10,600 cub. yds. earth exc. - -		16½	1,749 00	
25 cross ties.		35	8 75	
				2,052 75
Section 2.				
11 acres clearing - - -	20		220 00	
63 mile grubbing - - -	3 00		189 00	
20,250 cub. yds. earth exc. - -		16½	3,341 25	
60 cross ties - - - -		35	21 00	
4,000 ft. b. m. timber dlv'd -		15	60 00	
400 " " in work -		25	10 00	
				3,841 25
Section 3.				
20 acres clearing - - -	20		400 00	
70 mile grubbing - - -	3 00		210 00	
20,200 cub. yds. earth exc. - -		16½	3,333 00	
40 cross ties - - - -		35	14 00	
				3,957 00
Section 4.				
16 acres clearing - - -	20		200 00	
23 mile grubbing - - -	3 00		69 00	
11,800 cub. yds. earth exc. - -		16½	1,947 00	
2,000 ft. b. m. timber d'l. - -		15	30 00	
1,900 cross ties - - - -		35	665 00	
				2,911 00
Am't car'd forward - -	–		–	12,762 00
Am't bro't forward - -	–		–	12,762 00
Section 5.				
9 acres clearing - - -	20		180 00	
19 mile grubbing - - -	3 00		57 00	
9,000 cub. yds. earth exc. - -		16½	1,485 00	
12,000 ft. b. m. timber dl'd -		15	180 00	
3,600 cross ties - - - -		35	1,260 00	
				3,162 00
Section 6.				
4 acres clearing - - -	20		80 00	
19 mile grubbing - - -	3 00		57 00	

9,000 cub. yds. earth exc. - -	16½	1,485 00	
15,000 ft. b. m. timber d'd - -	15	225 00	
2,100 cross ties - - - -	35	735 00	
			2,582 00
Section 7.			
4 acres clearing - - -	20	80 00	
38 mile grubbing - - -	3 00	114 00	
9,000 cub. yds. earth exc. - -	16½	1,485 00	
			1,679 00
Section 8.			
1 acre clearing - - -	20	20 00	
06 mile grubbing - - -	3 00	18 00	
4,200 cub. yds. earth exc. - -	16½	693 00	
			731 00
			8,154 00
Am't car'd forward - -	–	–	20,916 00
Am't bro't forward - -	–	–	20,916 00
Section 9.			
3,600 cub. yds. earth exc. - -	16½	594 00	594 00
Section 10.			
6,500 cub. yds. earth exc. - -	16½	1,072 50	1,072 50
			1,666 50
Whole amount - - - - -	–	–	22,582 50
Former estimate - - - - -	–	–	16,862 70
Present " - - - - -	–	–	5,719 80
Per centage retained - - -	–	–	1,143 96
Amount due - - - - -	–	–	$4,575 84

Estimate for February, 1854, *P. & B. V. Railroad.*

MOSS, FRYE, & CO., CONTRACTORS.

Section 1.			
8 acres clearing - - -	20	160 00	
45 mile grubbing - - -	3 00	135 00	
10,600 cub. yds. earth exc. - -	16½	1,749 00	
25 cross ties - - - -	35	8 75	
			2,052 75

Sec. 2.			
11 acres clearing - - -	20	220 00	
63 mile grubbing - - -	3 00	189 00	
24,000 cub. yds. earth exc. - -	16½	3,960 00	
580 cross ties - - - -	35	203 00	
			4,572 00
Sec. 3.			
20 acres clearing - - -	20	400 00	
70 mile grubbing - - -	3 00	210 00	
32,500 cub. yds. earth exc. - -	16½	5,362 50	
7,300 ft. b. m. timber - -	15	109 50	
740 cross ties - - - -	35	259 00	
			6,341 00
Sec. 4.			
10 acres clearing - - -	20	200 00	
23 mile grubbing - - -	3 00	69 00	
19,500 cub. yds. earth exc. - -	16½	3,217 50	
7,000 ft. b. m. timber - -	15	105 00	
2,300 cross ties - - - -	35	805 00	
			4,396 50
Am't car'd forward - -	–	–	17,362 25
Am't bro't forward - -	–	–	17,362 25
Sec. 5.			
9 acres clearing - - -	20	180 00	
10 chains grubbing - -	10	100 00	
9,000 cub. yds. earth exc. - -	16½	1,485 00	
12,000 ft. b. m. timber - -	15	180 00	
3,600 cross ties - - - -	35	1,260 00	
			3,205 00
Sec. 6.			
4 acres clearing - - -	20	80 00	
19 mile grubbing - - -	3 00	57 00	
12,000 cub. yds. earth exc. - -	16½	1,980 00	
15,000 ft. b. m. timber - -	15	225 00	
2,800 cross ties - - - -	35	980 00	
			3,322 00
Sec. 7.			
4 acres clearing - - -	20	80 00	
38 mile grubbing - -	3 00	114 00	
9,000 cub. yds. earth exc. - -	16½	1,485 00	
1,000 cross ties - - - -	35	350 00	
			2,029 00
Sec. 8.			
1 acres clearing - - -	20	20 00	

66 mile grubbing - - -	3 00	18 00		
4,200 cub. yds. earth exc. - -	16½	693 00		
			731 00	
			9,287 00	
Am't car'd forward - -	–	–	26,649 25	
Am't bro't forward - -	–	–	26,649 25	
Sec. 9.				
3,600 cub. yds. earth exc. - -	16½	594 00	594 00	
Sec. 10.				
6,500 cub. yds. earth exc. - -	16½	1,072 50	1,072 50	
			1,666 50	
Whole amount - - - -	–	–	28,815 75	
Former estimate - - - -	–	–	22,582 50	
Present " - - - -	–	–	5,733 25	
Per centage retained - - -	–	–	1,146 65	
Amount due - - - -	–	–	4,586 60	

Peoria & B. V. Railroad.—Estimate for March, 1854.

MOSS, FRYE, & Co., CONTRACTORS.

Section 1.				
8 acres clearing - - -	20		160 00	
47 mile grubbing - - -	3 00		141 00	
10,600 cub. yds. earth exc. - -	16½		1,749 00	
25 cross ties.	35		8 75	
				2,058 75
Section 2.				
11 acres clearing - - -	20		220 00	
63 mile grubbing - - -	3 00		189 00	
25,000 cub. yds. earth exc. - -	16½		4,125 00	
2,232 ft. b. m. timber - -	15		33 48	
4,700 " " - - -	15		70 50	
580 cross ties - - - -	35		203 00	
				4,840 98
Section 3.				
20 acres clearing - - -	20		400 00	
70 mile grubbing - - -	3 00		210 00	

38,500 cub. yds. earth exc. - -		16½ 6,352 50	
8,300 ft. b. m. timber - -		15 124 50	
940 cross ties - - - -		35 329 00	
			7,416 00
Section 4.			
10 acres clearing - - -	20	200 00	
23 mile grubbing - - -	3 00	69 00	
21,000 cub. yds. earth exc. - -		16½ 3,465 00	
8,000 ft. b. m. timber - -		15 120 00	
2,650 cross ties - - - -	1 35	927 50	
			4,781 50
			74 16
			11,681 23
Am't car'd forward - -	–	–	19,097 23
			19,097 23
Section 5.			
9 acres clearing - - -	20	180 00	
19 mile grubbing - - -	3 00	57 00	
11,000 cub. yds. earth exc. - -		16½ 1,815 00	
12,000 ft. b. m. timber - -		15 180 00	
3,600 cross ties - - - -		35 1,260 00	
			3,492 00
Section 6.			
19 mile grubbing - - -	3 00	57 00	
15,000 cub. yds. earth exc. - -		16½ 2,475 00	
15,000 ft. b. m. timber - -		15 225 00	
3,000 cross ties - - - -		35 1,050 00	
			3,857 00
Section 7.			
4 acres clearing - - -	20	80 00	
38 mile grubbing - - -	3 00	114 00	
9,000 cub. yds. earth exc. - -		16½ 1,485 00	
1,400 cross ties - - - -		35 490 00	
			2,169 00
Section 8.			
1 acre clearing - - -	20	20 00	
06 mile grubbing - - -	3 00	18 00	
5,000 cub. yds. earth exc. - -		16½ 825 00	
			863 00
Section 9.			
3,600 cub. yds. earth exc. - -		16½ 594 00	
84 cross ties - - - -		35 29 40	
			623 40

Section 10.			
6,500 cub. yds. earth exc. - -	16½	1,072 50	
			12,626 90
			31,124 13
Am't bro't fow'd - - -	–	–	31,124 13
4 acres clearing in sec. 6, a -	20	–	80 00
Whole amount - - - - -	–	–	31,204 13
Former estimate - - - -	–	–	28,315 75
Present " - - - - -	–	–	2,888 38
Per centage retained - - -	–	–	577 67
Amount due - - - -	–	–	$2,310 71

Estimate for April, 1854, on P. and B. V. Railroad.

MOSS, FRYE, & Co., CONTRACTORS.

Sec. 1.			
8 acres clearing - - -	20	160 00	
47 mile grubbing - - -	3 00	141 00	
12,300 cub. yds. earth exc. - -	16½	2,029 50	
25 cross ties - - -	35	8 75	
			2,339 25
Sec. 2.			
11 acres clearing - - -	20	220 00	
63 mile grubbing - - -	3 00	189 00	
25,000 cub. yds. earth exc. - -	16½	4,125 00	
7,232 f't b. m. timber - -	15	108 48	
600 cross ties - - - -	–	210 00	
			4,852 48
Section 3.			
20 acres clearing - - -	20	400 00	
70 mile grubbing - - -	3 00	210 00	
48,000 cub. yd's earth exc. - -	16½	7,920 00	
1,040 cross ties - - - -	35	364 00	
15,000 f't b. m. timber - -	15	225 00	
			9,119 00
Sec. 4.			
10 acres clearing - - -	20	200 00	
23 mile grubbing - - -	3 00	69 00	
22,100 cub. yds. earth exc. - -	16½	3,646 50	

10,700 f't b. m. timber - -	15	160 50	
2,800 cross ties - - - -	35	980 00	
			5,056 00
Sec. 5.			
9 acres clearing - - -	20	180 00	
19 mile grubbing - - -	3 00	57 00	
17,400 cub. yds. earth exc. - -	16½	2,871 00	
19,500 f't b. m. timber - -	15	292 50	
3,600 cross ties - - - -	35	1,260 00	
			4,660 50
Amount carried fo'd - -	–	–	26,027 23
Amount bro't fo'd - -	–	–	26,027 23
Section 6.			
4 acres clearing - - -	20	80 00	
19 mile grubbing - - -	3 00	57 00	
18,000 cub. yds earth exc. - -	16½	2,970 00	
16,000 ft. b. m. timber- - -	15	240 00	
3,500 cross ties - - - -	35	1,225 00	
80 rods fence - - -	1	80 00	
			4,652 00
Section 7.			
4 acres clearing - - -	20	80 00	
42 mile grubbing - - -	3 00	126 00	
9,000 cub. yds. earth exc. - -	16½	1,485 00	
4,920 f't b. m. timber - - -	15	73 80	
2,045 cross ties - - - -	35	715 75	
40 rods fence - - - -	1	40 00	
			2,520 55
Sec. 8.			
1 acre clearing - - -	20	20 00	
06 mile grubbing - - -	3 00	18 00	
6,000 cub. yds. earth exc. - -	16½	990 00	
30 cross ties - - - -	35	10 50	
			1,638 50
Sec. 9.			
3,800 cubic yds. earth ex. - -	16½	627 00	
84 cross ties - - - -	35	29 40	
			656 40
			8,867 45
Am't car'd for'd - - -	–	–	34,894 68
Am't bro't forward - -	–	–	34,894 68

Section 10.				
6,500 cub. yds. earth exc. - -		16½	1,072 50	
270 cross ties - - - -		35	94 50	
				1,167 00
Whole am't - - - -		–	–	36,061 68
Former estimate - - - -		–	–	31,204 13
Present " - - - -		–	–	4,857 55
Per centage retained - - -		–	–	971 51
Amount due - - - -		–	–	3,886 04

Estimate for May, 1854.

MOSS, FRYE, & CO., CONTRACTORS.

Section 1.				
8 acres clearing - - -	20		160 00	
47 mile grubbing - - -	3 00		141 00	
17,300 cub. yds. earth exc. - -		16½	2,854 50	
1,000 ft. b. m. timber - -		15	15 00	
600 cross ties - - - -		35	210 00	
				50
				3,380 50
Section 2.				
11 acres clearing - - -	20		220 00	
63 mile grubbing - - -	3 00		189 00	
25,000 cub. yds. earth - - -		16½	4,125 00	
7,232 ft. b. m. timber - -		15	108 48	
600 cross ties - - - -		35	210 00	
				4,852 48
Section 3.				
20 acres clearing - - -	20		400 00	
700 mile grubbing - - -		30	210 00	
57,200 cub. yds. earth - - -		16½	9,438 00	
16,950 ft. b. m. timber - -		15	254 25	
1,360 cross ties - - - -		35	476 00	
				10,778 25
Section 4.				
10 acres clearing - - -	20		200 00	
23 mile grubbing - - -	3 00		69 00	
22,750 cubic yds. - - -		16½	3,753 75	

11,100 ft. b. m. timber - -		15	166 50	
3,380 cross ties - - - -		35	1,183 00	
				5,372 25
Car'd forward - - -		–	–	24,383 48
Bro't forward - - -		–	–	24,383 48
Sec. 5.				
9 acres clearing - - -	20		180 00	
23 mile grubbing - - -	3 00		69 00	
21,600 cubic yards - - -		16½	3,664 00	
19,500 ft. b. m. timber - -		15	292 50	
4,000 cross ties - - - -		35	1,400 00	
				95 50
				5,505 50
Section 6.				
4 acres clearing - - -	20		80 00	
19 mile grubbing - -	3 00		57 00	
28,800 cub. yds. earth exc. - -		16½	3,432 00	
16,000 ft. b. m. timber - -		15	240 00	
80 rods fence - - -	1		80 00	
4,200 cross ties - - -		35	1,470 00	
				5,359 00
Section 7.				
5 acres clearing - - -	20		100 00	
42 mile grubbing - - -	3 00		126 00	
9,400 cub. yds. earth exc. - -		16½	1,551 00	
5,300 ft. b. m. timber - -		15	79 50	
40 rods fence - - -	1		40 00	
2,150 cross ties - - - -		35	752 50	
				2,649 00
Section 8.				
1 acre clearing - - -	20		20 00	
06 mile grubbing - - -	3 00		18 00	
11,300 cubic yds. - - -		16½	1,864 50	
5,300 ft. b. m. timber - -		15	79 50	
30 cross ties - - - -		35	10 50	
				1,992 50
				15,506 00
Am't car'd forward - -		–	–	39,889 48
Am't bro't forward - -		–	–	39,889 48

Sec. 9.			
3,800 cub. yds. earth - -	16½	627 00	
2,600 ft. b. m. timber - -	15	39 00	
84 cross ties - - - -	35	29 40	
			695 40
Sec. 10.			
6,500 cubic yards earth - -	16½	1,072 50	
270 cross ties - - - -	35	94 50	
			1,167 00
			1,862 40
Whole am't - - - - -	–	–	41,751 88
Former es't - - - - -	–	–	36,061 68
Present " - - - - -	–	–	5,690 20
Per centage - - - - -	–	–	1,138 04
Am't due - - - - -	–	–	4,552 16

Estimate for June, 1854, *on P. & B. V. Railroad.*

MOSS, FRYE, & Co., CONTRACTORS.

Sec. 1.			
8 acres clearing - - -	20	160 00	
47 mile grubbing - - -	3 00	131 00	
22,400 cub. yds. earth exc. - -	16½	3,696 00	
600 cross ties - - - -	35	210 00	
834 ft. b. m. timber - -	15	12 51	
			4,219 51
Sec. 2.			
11 acres clearing - - -	20	220 00	
63 mile grubbing - - -	3 00	189 00	
25,900 cub. yds. earth exc. - -	16½	4,273 50	
8,280 ft. b. m. timber - -	15	124 20	
880 cross ties - - - -	35	308 00	
			5,114 70
Sec. 3.			
20 acres clearing - - -	20	400 00	
70 mile grubbing - - -	3 00	210 00	
61,700 cub. yds. earth exc. - -	16½	10,180 50	
26,482 ft. b. m. timber - -	15	397 23	
3,160 cross ties - - - -	35	1,106 00	
			12,293 73

Sec. 4.				
10 acres clearing		20	200 00	
23 mile grubbing		3 00	69 00	
24,000 cub. yds. earth ex.		16½	3,960 00	
13,568 ft. b. m. timber		15	203 52	
3,380 cross ties		35	1,183 00	
				5,615 52
Am't car'd forward		–	–	27,243 46
Am't bro't fow'd		–	–	27,243 46
Sec. 5.				
9 acres clearing		20	180 00	
23 mile grubbing		3 00	69 00	
23,000 cub. yds. earth exc.		16½	3,795 00	
20,477 ft. b. m. timber		15	307 15	
4,040 cross ties		35	1,414 00	
				5,765 15
Sec. 6.				
4 acres clearing		20	80 00	
19 mile grubbing		3 00	57 00	
22,600 cub. yds. earth exc.		16½	3,729 00	
17,084 ft. b. m. timber		15	256 26	
4,200 cross ties		35	1,470 00	
80 rods fence		1	80 00	
				5,672 26
Sec. 7.				
55 acres clearing		20	110 00	
50 mile grubbing		3 00	150 00	
12,000 cub. yds. earth exc.		16½	1,980 00	
2,150 cross ties		35	752 50	
40 rods fence		1	40 00	
				3,032 50
Sec. 8.				
3 acres clearing		20	60 00	
06 mile grubbing		3 00	18 00	
14,600 cub. yds. earth exc.		16½	2,409 00	
30 cross ties		35	10 50	
				2,497 50
				16,967 41
Am't car'd forward		–	–	44,210 87
Am't bro't forward		–	–	44,210 87

Sec. 9.			
3,800 cub. yds. earth exc. - -	16½	627 00	
84 cross ties.	35	29 40	
			656 40
Sec. 10.			
8,000 cub. yds. earth exc. - -	16½	1,320 00	
270 cross ties - - - -	35	94 50	
			1,414 50
			2,070 90
Whole amount - - - - -	–	–	46,281 77
Former estimate - - - -	–	–	41,751 88
Present " - - - - -	–	–	4,529 89
Per centage retained - - -	–	–	905 98
Amount due - - - - -	–	–	3,623 91

Abstract of above estimate.

705 acres clearing - - -	20	1,410 00	282 00	1,128 00
301 mile grubbing - - -	3 00	903 00	180 60	722 40
218,000 cub. yd. earth ex. - -	16½	35,970 00	7,194 00	6 00
86,725 ft. b. m. timber - - -	15	1,300 87	260 17	
18,794 cross ties - - - -	35	6,577 90	1,315 58	
120 rods fence - - - -	1	120 00	24 00	
		46,281 77	9,256 35	

Peoria and Burean Valley Railroad.—Estimate for July, 1854.

MOSS, FRYE, & Co., CONTRACTORS.

Quantity.	Price.	Amount.	Amount.
Section No. 1.			
8 acres clearing - - -	20	160 00	
51 mile grubbing - - -	3 00	153 00	
28,000 cub. yds. earth exc. - -	16½	4,620 00	
5,926 ft. b. m. timber - -	25	148 15	
2,000 cross ties - - - -	35	700 00	
			5,781 15
Section No. 2.			
11 acres clearing - - -	20	220 00	
63 mile grubbing - - -	3 00	189 00	

Quantity.	Price.	Amount.	Amount.
25,900 cub. yds. earth exc.	16½	4,273 50	
13,032 f't b. m. timber	25	328 80	
880 cross ties	35	308 00	
			5,316 30
Section No. 3.			
20 acres clearing	20	400 00	
70 mile grubbing	3 00	210 00	
61,700 cub. yds. earth exc.	16½	10,180 50	
32,346 ft. b. m. timber	25	808 65	
3,100 cross ties	35	1,085 00	
			12,684 15
Section No. 4.			
10 acres clearing	20	200 00	
23 mile grubbing	3 00	69 00	
24,300 cub. yds. earth exc.	16½	4,009 50	
16,144 ft. b. m. timber	25	403 60	
3,400 cross ties	35	1,190 00	
			5,872 10
Am't car'd forward	–	–	29,653 70
" bro't "	–	–	29,653 70
Section No. 5.			
9 acres clearing	20	180 00	
23 mile grubbing	3 00	69 00	
23,000 cub. yds. earth exc.	16½	3,795 00	
22,285 ft. b. m. timber	25	557 12	
4,040 cross ties	35	1,414 00	
			6,015 12
Section No. 6.			
4 acres clearing	20	80 00	
19 mile grubbing	3 00	57 00	
22,600 cub. yds. earth exc.	16½	3,729 00	
19,934 ft. b. m. timber	25	498 35	
4,200 cross ties	35	1,470 00	
80 rods fence	1	80 00	
			5,914 35
Section No. 7.			
550 acres clearing	20	110 00	
50 mile grubbing	3 00	150 00	
12,850 cub. yds. earth exc.	16½	2,120 25	

Quantity.	Price.	Amount.	Amount.
7,600 f't b. m. timber - -	25	190 00	
2,150 cross ties - - - -	35	752 50	
40 rods fence - - -	1	40 00	
			3,362 75
Section No. 8.			
3 acres clearing - - -	20	60 00	
06 mile grubbing - - -	3 00	18 00	
16,000 cub. yd's earth exc. - -	16½	2,640 00	
10,500 ft. b. m. timber - -	25	262 50	
30 cross ties - - -	35	10 50	
			2,991 00
			18,283 22
Am't car'd for'd - - -	–	–	47,936 92
Am't bro't forward - -	–	–	47,936 92
Section No. 9.			
3,800 cub. yds. earth exc. - -	16½	627 00	
11,250 ft. b. m. timber - -	25	281 25	
84 cross ties - - - -	35	29 40	
			937 65
Section No. 10.			
8,217 cub. yds. earth exc. - -	16½	1,355 80	
7,000 ft. b. m. timber - -	25	175 00	
270 cross ties - - - -	35	94 50	
			1,625 30
			2,562 95
Whole amount - - - - -	–	–	50,499 87
Former estimate - - - -	–	–	46,281 77
Present " - - - - -	–	–	4,218 10
Per centage retained - - -	–	–	843 62
Amount due - - - - -	–	–	3,374 48

Abstract of above estimate.

	Price.	Whole Am't.	Per cent. retained.	Am't Paid.
705 acres clearing - - -	20	1,410 00	282 00	1,128 00
305 miles grubbing - - -	3 00	915 00	183 00	732 00
226,367 cub. yd. earth exc. - - -	16½	37,350 55	7,470 11	29,880 44
146,017 ft. b. m. timber - - -	25	3,650 42	730 08	2,920 34
20,154 cross ties - - - -	35	7,053 90	1,410 78	5,643 12
120 rods fence - - - -	1	120 00	24 00	96 00
	50	499 87	10,099 97	40,399 90

Upon a comparison of these last mentioned estimates, prepared as aforesaid by the witness, Warner, with the estimates aforesaid, which the witness testified were furnished from the engineer's office, they were found to agree in every particular as to *quantaties* from month to month.

Witness, Warner, then testified that the estimate for each month was usually received by him from the engineer's office in the latter part of said month, after the 20th day thereof; and the estimates prepared as aforesaid by the witness were generally prepared and ready for delivery to the plaintiffs by the first of the month next succeeding that to which the estimate had reference. Witness also testified that the receipts herein following, set out and numbered 5, 6, 7, 8, 9, 10, 11, and 13 were prepared by time; and all of them, except No. 10, were delivered by the witness to Mr. Jackman, one of the defendants, together with the estimates to which each of said receipt respectively refer, before or on the day of the date of each of said receipts respectively; and that within a day or two after the delivery of each of said receipts respectively to Jackman as aforesaid, with its corresponding estimate, said Jackman returned said receipts to the witness, with the signatures of the plaintiffs thereto, as they now appear; that as to the receipt No. 10 aforesaid, witness paid the money therein mentioned in person to Mr. Frye, one of the plaintiffs, and at the same time delivered to him the April estimate above set out, and said Frye signed and returned said receipt to witness. Defendants then offered to prove by said witness that defendant, Jackman, upon receiving each of the aforesaid receipts, Nos. 5, 6, 7, 8, 9, 11, and 13, from the hands of the witness took the same, together with a copy of the estimate referred to in the receipts, and also money sufficient to pay said estimate; and he stated he was going for the purpose of delivering the copy of the estimate to plaintiffs, paying the money to them, and getting the

Quantity.	Price.	Amount.	Amount.
7,600 f't b. m. timber - -	25	190 00	
2,150 cross ties - - - -	35	752 50	
40 rods fence - - -	1	40 00	
			3,362 75
Section No. 8.			
3 acres clearing - - -	20	60 00	
06 mile grubbing - - -	3 00	18 00	
16,000 cub. yd's earth exc. - -	16½	2,640 00	
10,500 ft. b. m. timber - -	25	262 50	
30 cross ties - - -	35	10 50	
			2,991 00
			18,283 22
Am't car'd for'd - - -	–	–	47,936 92
Am't bro't forward - -	–	–	47,936 92
Section No. 9.			
3,800 cub. yds. earth exc. - -	16½	627 00	
11,250 ft. b. m. timber - -	25	281 25	
84 cross ties - - - -	35	29 40	
			937 65
Section No. 10.			
8,217 cub. yds. earth exc. - -	16½	1,355 80	
7,000 ft. b. m. timber - -	25	175 00	
270 cross ties - - - -	35	94 50	
			1,625 30
			2,562 95
Whole amount - - - -	–	–	50,499 87
Former estimate - - - -	–	–	46,281 77
Present " - - - - -	–	–	4,218 10
Per centage retained - - -	–	–	843 62
Amount due - - - -	–	–	3,374 48

Abstract of above estimate.

	Price.	Whole Am't.	Per cent. retained.	Am't Paid.
705 acres clearing - - -	20	1,410 00	282 00	1,128 00
305 miles grubbing - - -	3 00	915 00	183 00	732 00
226,367 cub. yd. earth exc. - - -	16½	37,350 55	7,470 11	29,880 44
146,017 ft. b. m. timber - - -	25	3,650 42	730 08	2,920 34
20,154 cross ties - - - -	35	7,053 90	1,410 78	5,643 12
120 rods fence - - - -	1	120 00	24 00	96 00
	50	499 87	10,099 97	40,399 90

Upon a comparison of these last mentioned estimates, prepared as aforesaid by the witness, Warner, with the estimates aforesaid, which the witness testified were furnished from the engineer's office, they were found to agree in every particular as to *quantaties* from month to month.

Witness, Warner, then testified that the estimate for each month was usually received by him from the engineer's office in the latter part of said month, after the 20th day thereof; and the estimates prepared as aforesaid by the witness were generally prepared and ready for delivery to the plaintiffs by the first of the month next succeeding that to which the estimate had reference. Witness also testified that the receipts herein following, set out and numbered 5, 6, 7, 8, 9, 10, 11, and 13 were prepared by time; and all of them, except No. 10, were delivered by the witness to Mr. Jackman, one of the defendants, together with the estimates to which each of said receipt respectively refer, before or on the day of the date of each of said receipts respectively; and that within a day or two after the delivery of each of said receipts respectively to Jackman as aforesaid, with its corresponding estimate, said Jackman returned said receipts to the witness, with the signatures of the plaintiffs thereto, as they now appear; that as to the receipt No. 10 aforesaid, witness paid the money therein mentioned in person to Mr. Frye, one of the plaintiffs, and at the same time delivered to him the April estimate above set out, and said Frye signed and returned said receipt to witness. Defendants then offered to prove by said witness that defendant, Jackman, upon receiving each of the aforesaid receipts, Nos. 5, 6, 7, 8, 9, 11, and 13, from the hands of the witness took the same, together with a copy of the estimate referred to in the receipts, and also money sufficient to pay said estimate; and he stated he was going for the purpose of delivering the copy of the estimate to plaintiffs, paying the money to them, and getting the

receipt signed by them to the statement of Jackman as evidence. Plaintiffs objected as incompetent testimony, and the court sustained the objection, and refused to allow defendants to give said declarations of one of the defendants to the jury; to which decision of the court in sustaining said objections of plaintiffs, and in refusing to allow defendants to give said declarations to the jury, defendants by their counsel then and there excepted.

The defendants then read in evidence the following receipts, the signatures thereto being admitted to be genuine, viz:

No. 1. "Received of Goss, Jackman, & Co., by the hand of M. M. Jackman, ($1,992 84,) one thousand nine hundred and ninety-two dollars and eighty-four cents, to apply on the estimate for the month of September, one thousand eight hundred and fifty-three, on the Peoria and Burean Valley Railroad.

Peoria, October 12th, 1853.

MOSS, FRYE, & Co.,
By SMITH FRYE."

No. 2. "$500.—Received of Goss, Gardner, & Jackman five hundred dollars, it being an advance on our October estimate on the Peoria and Burean Valley Railroad.

Peoria, October 18th.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 3. "Received of Goss, Jackman, & Co., by the hand of M. M. Jackman, ($802 78,) eight hundred and two dollars and seventy-eight cents, that being the amount due us for work done on the line of the Peoria and Burean Valley Railroad up to the first day of November, 1853, or in full for October estimate.

MOSS, FRYE, & Co.,
Per WM. S. MOSS.

[It was here admitted by the plaintiffs that the defendants let plaintiffs have a stock of tools in the month of October, 1853, and that said tools were worth $422 86.]

The defendants gave in evidence the further receipts following, the signatures thereto being admitted to be genuine, viz:

No. 4. "Received of Goss, Jackman, & Co., by the hand of M. M. Jackman, ($240 00,) two hundred and forty dollars, to apply in payment for cross ties delivered on the line of the Peoria and Burean Valley Railroad, at thirty cents per tie, twenty per cent. being retained as security for the fulfilment of contract.

Dated at Peoria, Nov. 10th, 1853.

MOSS, FRYE, & Co.,
Per WM. S. MOSS.

No. 5. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.
1853. To Moss, Frye, & Co., Dr.

To estimate for month of November on contract for work on above named railroad, 4,019 28.

Received of Goss, Jackman, & Co., by the hand of M. M. Jackman, four thousand and nineteen and 28-100 dollars, in full for the above account.

Dated at Peoria, December 8th, 1853.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 6. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.
1853. To Moss, Frye, & Co., Dr.

To estimate for month of December on contract for work on above named railroad, 5,512 40.

Received of Goss, Jackman, & Co., by the hands of M. M. Jackman, five thousand five hundred and twelve 40-100 dollars, in full for the above account.

Dated at Peoria, January 9th, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 7. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.
1854. To Moss, Frye, & Co., Dr.

To estimate for month of January on contract for work on above named railroad, 4,575 84.

Received of Goss, Jackman, & Co., by the hands of M. M. Jackman, four thousand five hundred and seventy-five 84-100 dollars, in full for the above account.

Dated at Peoria, February 10th, 1854.

MOSS, FRYE, & Co.,
Per CHAS. GREENLEAF.

No. 8. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.

1854. To Moss, Frye, & Co., Dr.

To estimate for month of February on contract for work on above-named railroad, 4,586 60.

Received of Goss, Jackman, & Co., by the hand of M. M. Jackman, four thousand five hundred and eighty-six 60-100 dollars, in full for the above account.

Dated Peoria, March 10, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 9. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.

1854. To Moss, Frye, & Co., Dr.

To estimate for the month of March on contract for work on above-named railroad, 2,310 71.

Received of Goss, Jackman, & Co., by the hands of M. M. Jackman, two thousand three hundred and ten 71-100 dollars, in full for the above account.

MOSS, FRYE, & Co.,
By SMITH FRYE.

Dated Peoria, April 8th, 1854.

No. 10. Peoria and Burean Valley Railroad.

Goss, Jackman, & Co.

To Moss, Frye, & Co., Dr.

To estimate for month of April on contract for work on above named railroad, $3,886 04.

Received of Goss, Jackman, & Co., by the hands of C. Warner, thirty-eight hundred and eighty-six 4-100 dollars, in full for the above account.

Dated Peoria, May 6th, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 11. Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.

1854. To Moss, Frye, & Co., Dr.

To estimate for month of May on contract for work on above named railroad, 4,552 16.

Received of Goss, Jackman, & Co., by the hands of M. M. Jackman, four thousand five hundred and fifty-two 16-100 dollars, in full for the above account.

Dated Peoria, June 10, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 12. "Peoria and Burean Valley Railroad.

Grading, &c., account.

Goss, Jackman, & Co.

1854. To Moss, Frye, & Co., Dr.

To estimate for month of June on contract for work on above named railroad, 3,623 91, being balance due after deducting our payment of last month's estimate; said Moss, Frye, & Co. claiming that said deduction for our estimate ought not to be made."

"Received of Goss, Jackman, & Co., by the hands of P. W. Duane, three thousand six hundred and twenty-three 91-100 dollars, in full for the above account.

Dated Peoria, July 9th, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE.

No. 13. "Peoria and Burean Valley Railroad.

1854. *Grading, &c., account.*

Goss, Jackman, & Co.
To Moss, Frye, & Co., Dr.

To estimate for month of July on contract for work on above named railroad - - - - - -	3,374 48
By cash for timber, cr. - - - - - -	1,482 30
Balance due - - -	1,892 18

"Received of Goss, Jackman, & Co., by the hands of M. M. Jackman, one thousand eight hundred and ninety-two 18-100 dollars, in full for the above account.

Dated Peoria, Aug. 10th, 1854.

MOSS, FRYE, & Co.,
By SMITH FRYE."

Defendants then offered to read in evidence a written contract between Henry Farnam and others of the one part, and defendants of the other part, having proved the execution thereof; which contract was in the words and figures following:

Copy.

Peoria and Burean Valley Railroad Company.

GENERAL SPECIFICATIONS.

Grubbing and clearing.

1. All trees and brushwood within the bounds of the company's land, must be chopped low and burned up, or removed so as not to obstruct the lines for fences or injure the adjoining land. All logs, bushes, and other perishable materials shall be removed from the space to be occupied by the embankments; and in general the trees, stumps, and roots shall be grubbed up out between the slope stakes, except where the embankments exceed two and a half feet in height; in the latter case, they shall be cut off close to the ground.

Grading.

2. Earth excavation.—The earth shall be excavated true and even to a prism, not less than twenty feet wide at a grade line in cuttings, with slopes in general of one and a half horizontal to one vertical, but varying from this according to circumstances, at the discretion of the engineer. The disposition of surplus material and the borrowing of material to complete the embankments, shall be in such places, manner, and quantities as the engineer may direct.

3. Rock excavation.—Rock shall be excavated reasonably true and even to a prism, not less than fourteen feet wide at the grade line, with slopes of one horizontal to five vertical, subject to the direction of the engineer, as in earth cutting.

4. Embankments shall have such width as the engineer may direct. In general, the slopes will be one and a half horizontal to one vertical. No stumps, logs, brush, or other perishable material will be allowed in the embankments; and the muck or vegetable matter beneath the same shall be removed, when required by the engineer. When side ditches are excavated for drainage, or in borrowing materials for embankments, they shall be cut true and even, at such distances from the foot of the embankments as the engineer may direct, and with the slope nearest the embankments not steeper than one and a half to one. The dressing and finishing of the surface of the road bed, and of the slopes of excavations and embankments, shall conform exactly to the lines and levels given by the engineer, and shall be done to his satisfaction.

5. Road bed.—When the material in the bottom of the excavations, in the opinion of the engineer, is unfit for road bed, it shall be removed to a depth not exceeding two feet below the grade line, and replaced by gravel or other suitable mate-

rial. The upper portion of the embankments shall also be formed, when required, of gravel or other proper ballasting, not exceeding two feet in depth.

6. Ditching.—All excavations shall have ditches on each side, of such form and dimensions as the engineer may direct. Other ditches along embankments or elsewhere, for protection or drainage, shall be made by the contractor when required.

7. Roads and water courses.—Changes of public or private roads, and of streams, also the grading of side tracks, and of road and farm crossings, and such other earth work as in the opinion of the engineer may be necessary, shall be done when required by him, and shall conform truly to his levels, measurements, and directions.

8. The engineer reserves the right to change the line of *of* roadway, grade, or section stake before or during the progress of the work; provided that, in case such alteration shall increase the expense to the contractor, said extra expense shall be estimated by the engineer, and paid for by the party of the second part.

9. All work above specified shall be measured in excavation, and come under the head of "earth" or "solid rock." By solid rock, will be understood rock as found in ledge, or in boulders, exceeding one cubic yard. All other excavation, of whatever kind or quality, shall be termed earth, and paid for as such, at the price of earth excavation.

Masonry.

10. Foundations.—In cases where, in the opinion of said engineer, it will be expedient to use bearing piles for a foundation, *for a foundation*, they shall be driven in such manner and of such lengths as said engineer may direct. After the piles are driven and capped, the spaces around them should be filled with loose stone or coarse gravel. A floor of oak plank shall be laid on the cap timber, and well treenailed to them. On this floor the masonry shall be commenced. In cases where bearing piles will not be used, a proper base shall be formed, as said engineer shall direct, on which oak timbers shall be laid, and any spaces between them filled with gravel and well rammed down. On these timbers a floor of oak plank shall be laid, and well treenailed to them. If, in the opinion of said engineer, timbers may in any case be dispensed with, then the foundation shall be made in such manner as he may direct.

11. Culverts shall be arched in places where they are so designated on the original profile of the road, as presented with the report of the chief engineer, August 25th, 1851. The abutments, piers, arches, spandals, parapets, walls, and wings, to conform to plans that may be furnished by said engineer.

The masonry to be of the style of rough hammered work, laid in a neat and compact manner and well banded; no stone to be used in the face that is less than six inches thick and twelve inches long, and that will not bed twelve inches in the wall. Stone in all cases to be laid on their broadest beds, and no stone to have more height than bed. The arch-stone to be in general of such depth as to lay the full thickness of arch when not more than fifteen inches, and of no greater thickness than two-thirds the depth of arch, and laid so that their beds conform to the radius of the arch. Culvert masonry shall be well laid in mortar, composed of one part best hydraulic cement, and three parts clean sand, well mixed and promptly used after mixture. No mortar that has been made more than three hours, shall be put in masonry.

12. Bridge masonry will be composed mostly of abutments and piers. The style and manner of workmanship shall be the same as specified for culverts.

13. In all filling around masonry or other walls, care shall be taken to use small stones, sand or gravel, that will not be liable to heave with frost.

14. No hydraulic cement is to be used until it shall have been tested and approved by said engineer.

15. All masonry shall be carried up in a regular manner, and levelled off in courses of not less than eighteen inches in height, if required by said engineer.

16. Stone used in the masonry shall be of sound and durable quality and free from dirt.

Timber and Trestle work.

17. The timber for wooden culverts, bridges, trestle work, or other structures, including all sawed lumber and plank, must be of sound and thrifty white oak or white pine, free from wane, sap, shakes, and other defects. The lengths and dimensions must conform exactly to the bills furnished by the engineer, who shall have power to reject all such sticks as in his opinion are unfit for the work. The framing must be executed in a workmanlike manner, in conformity with the plans and directions of the engineer, and to his entire satisfaction.

18. All the quantities upon which the proposals are based, are to be considered as approximate only; and the right is reserved to the engineer of having such amounts of grading done, or such kinds of quantities of masonry built, or timber or any other material delivered, as the economy of the work may in his discretion require, and of substituting one kind for another.

19. If any foreman, overseer, or laborer employed by the contractor shall, in the opinion of the engineer, execute his work in an unfaithful or unskilful manner, or be disrespectful

or riotous in his conduct, he shall forthwith, by direction of said engineer, be discharged; and no person shall be employed upon the work who has been so discharged from any work within the knowledge of the contractor or engineer.

20. On notice being given by any laborer or workman that he is not regularly paid by the contractor, and satisfactory evidence being shown of the truth of the statement, the engineer may pay said laborer or workman, and charge the same to said contractor as cash on account; also, in like manner, any other indebtedness which involves the credit or reputation of the work hereby contracted for.

21. If any damage be done by the contractor, or by any person in his employ, to the land or property adjoining or in the vicinity of his work, the engineer shall have the right to estimate such damage, and pay the amount to the owner of such land or property, and charge the same to said contractor.

22. The engineer will be the judge *whether* the work is progressing with sufficient rapidity to ensure its completion within the time specified; and if in his opinion the work is not thus progressing, he may employ other assistance, the cost of which shall be paid by the contractor.

23. All work and materials of every description are to be at the risk of the contractor, until his whole job shall be completed and accepted; the contractor having no right to demand that any part of his work be finally estimated, until the completion of all the work contracted for.

A more full explanation of the form and dimensions of materials and parts, and of the manner of constructing the work in all its details, will be furnished by the engineer; who will also give such directions from time to time during the progress of the work as may appear to him necessary and proper, in order to render the work complete and perfect on the plan contemplated in the foregoing specifications. And the said directions shall in every respect be completed with, and the entire work finished to the full satisfaction of the engineer.

Peoria and Burean Valley Railroad Company.

This agreement, made and concluded this fourth day of August, one thousand eight hundred and fifty-three, between George Goss, Moses M. Jackman, and Ransom Gardner, of the first part, and Messrs. Henry Farnam & Co., of the second part, witnesseth:

The aforesaid party of the first part, in consideration of the prices hereinafter agreed to be paid by the party of the second part, hereby covenant and agrees to gravel and construct sections one to twenty-five, inclusive, of the Peoria and Burean Valley, in such manner as shall conform in every respect to the annexed specifications, which shall be considered as part of this contract, and to the following conditions:

1. The work shall be commenced within thirty days after the execution of this contract, and shall be completed on or before the first day of June, one thousand eight hundred and fifty-four.

2. The work shall be executed under the direction and supervision of the engineer of the company, by whose measurements and calculations the amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject or condemn all work or materials which, in his opinion, do not fully conform to the spirit of this agreement, and shall decide all questions which may arise between the parties relative to the execution thereof; and his decision shall be final and binding upon both parties.

3. Any omission to disapprove of defective work, at the time of any estimate, shall not be construed as an acceptance of said work.

4. If the party of the first part refuses or unreasonably neglects to remedy any imperfection which may be pointed out by the engineer, or by the party of the second part, or fails to prosecute the work with the required despatch, or in any manner violates the conditions of this contract, so that in the judgment of the engineer, or in the judgment of the party of the second part, there may be just grounds of apprehension that the work will not be completed in the manner or within the time herein specified, then the engineer or said party of the second part may serve a written notice upon said party of the first part, specifying the manner and the time in which said party shall cause such grounds of apprehension to be removed; and if, at the expiration of said time, said grounds of apprehension are not removed, then full power and authority is hereby vested in said engineer, or in said party of the second part, to declare this contract forfeited; and on such declaration being given in writing by the engineer, or by said party of the second *party* to the party of the first part, or if said notice shall be given by the engineer, then to the parties hereto this contract shall cease immediately; and the said party of the second part shall be entitled to the reserved per centage, as a consideration for the damages that may be sustained by reason of the forfeiture of this contract.

In consideration of the faithful performance of all the conditions of this contract, the party of the second part agrees to pay said party of the first part, on the estimate of the engineer, as follows:

For grubbing, clearing, and side chopping the sections as specified, dollars.

For earth excavation, at the rate of twenty cents per cubic yard.

For excavation of rock, including stone, measuring over one cubic yard, at the rate of seventy-five cents per cubic yard.

For rubble masonry, laid dry, at the rate of four hundred cents per cubic yard.

For rubble masonry, laid in cement, at the rate of five dollars per cubic yard.

For well-hammered masonry, laid in cement, at the rate of dollars per cubic yard.

For timber and plank in foundations and bridges, at the rate of thirty doll's per m. ft., b'd m'sure.

For timber and plank in wood culverts, at the rate of thirty doll's per m. ft., b'd m'sure.

For plank in road and farm crossings, at the rate of twenty-five dollars per m. ft., b'd m'sure.

For piles in bridges, at the rate of thirty-five cents per lineal foot.

For wrought iron in bridges, at the rate of thirteen cents per pound.

For cast iron in bridges, at the rate of six cents per pound.

Fort cattle-guards, at the rate of twenty-seven dollars each.

For fence, at the rate of one 25-100 dollars per rod.

For ballasting, at the rate of twenty-five cents per cubic yard.

For cross ties, at the rate of forty cents each in track.

For track laying, at the rate of three hundred and seventy-five dollars per mile.

For rip rap protection, at the rate of two 50-100 dollars per cubic yard.

The prices above specified are to be in full compensation for all the materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract.

In order to enable the contractors to prosecute the work advantageously, the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad. The said party of the second part will pay in current money ninety per cent., and in the capital stock of the company ten per cent., of the amount of said estimate.

Fifteen per cent. of the estimates, as they are made to the party of the first part, may be retained by the party of the second part, as damages in case of a forfeiture of this contract; which said fifteen per cent., together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part, within thirty days after all the work herein contracted for is completed and accepted by the engineer.

The above payments on estimates shall be made on the fifth day of each month, at the office in Chicago.

The fifteen per cent. retained as above, shall be five per cent. in cash and ten per cent. in stock.

It is further agreed, that in consideration of the party of the first part completing the work herein contracted for previous to the date above named in this contract, the party of the second part are to pay said party of the first part three thousand dollars per month for each and every month the work is completed previous to said date. It is understood that having the track in such order as to render it safe for passenger trains, shall entitle the party of the first part to the extra compensation as above.

It is further agreed by the parties to this contract, that in case it should become necessary to draw ties, stone, or materials for the road from any point on the Chicago and Rock Island Railroad, that in that case said party of the second part agree to furnish said party of the first part an engine, engineers, fireman, and train of cars to draw such materials, for which said party of the first *part* are to pay at the rate of twenty-five dollars per day, and to furnish oil for the cars, and wood and oil for the engine, and return the same in as good condition as when taken.

It is further agreed that said party of the second part is to furnish said party of the first part an engine, engineer, and fireman to work upon the said Peoria and Burean Valley Railroad, and a sufficient number of cars to do their work; the said party of the first part are to furnish wood and oil for the engine, and oil for the cars.

The engine and cars are to be kept in repairs by the *by the* party of the second part, unless injured by the carelessness or neglect of the party of the first part.

It is further agreed, that in case any cemented clay or gravel shall be excavated, the price for the same shall be agreed upon between the parties to this contract; or in case they cannot agree, the same shall be estimated by the chief engineer, and his decision shall be final between the parties.

It is further agreed, that the party of the second part will pay the party of the first part, for haul on section twenty-two, and on the section which crosses the Matchronie, at the rate of five mills per cubic yard per hundred feet for each and every hundred feet over and above a haul of two hundred feet.

It witness whereof, said parties have hereunto set their hands and seals the day and year first written.

GEO. GOSS, [SEAL.]
MOSES M. JACKMAN, [SEAL.]
RANSOM GARDNER, [SEAL.]
HENRY FARNAM, [SEAL.]
For JOS. E. SHEPPERD. [SEAL.]
WILLIAM WALCOTT, [SEAL.]
THOMAS C. DEMENT. [SEAL.]

To the reading of which plaintiffs objected, and to obviate the reading thereof admitted that by said contract Henry Farnam and others was to pay defendants $25 per acre for clearing, $10 per chain for grubbing, $0,20 per cubic yard for *for* excavation, $30 per thousand feet, board measure, for plank and timber in the work. And thereupon the court sustained the objections of plaintiffs, and refused to permit defendants to read in evidence said contract between them and Henry Farnam and others aforesaid; to which decision of the court defendants excepted.

Witness, Warren, testified in substance further, that defendants took charge of the work after plaintiffs abandoned the same, and *progressed* with it, adding largely to the excavation, ties, timber, &c., *until*, in December, 1854, Farnam and others took the work off the hands of defendants, still not fully completed, and settled with them; and that subsequently defendant built fence for Farnam and others under another contract.

Defendants gave further evidence tending to show that one of the plaintiffs had said that the money was always promptly paid on the estimates; that he only alleged that the engineers had under-estimated them, which complaints of under-estimates were made frequently and at divers times.

Two or more of the engineers testified that the estimates were over-estimates instead of being under-estimates; and defendants proof tended to show that the changes in the grade and the plan of the culverts were not of any disadvantage to the contractor.

During the trial plaintiffs produced a copy of the estimate made by the engineers of said railroad company of all the work done and materials furnished by defendants up to about the 20th of August, A. D. 1854, on all the line of this railroad, and offered to read therefrom so much as related to the work of the ten sections, numbered 1 to 10 inclusive; to which defendants objected, but not on the ground of the order in which it was offered. The court overruled the defendants objections, and the said estimates having been referred to by various witnesses, allowed the same to be read in connexion with the evidence of the witnesses, and as explanatory thereof; to which decision defendants excepted. The following is a copy of the matter read in evidence from said August estimate:

Peoria and Burean Valley Railroad.

ESTIMATE FOR AUGUST, 1854.

Sec. No. 1.				
8 acres clearing - - -	$25		200 00	
27 chains grubbing - -	10		270 00	
28,000 cub. yds. earth exc. - -		20	5,600 00	
400 " " " in culvert pits		20	80 00	
120 " " " -		20	24 00	
5,411 " stone foundation -	3		162 33	
5,899 " dry masonry -	4		235 96	
10,830 " cement - -	5		541 50	
32 " stone foundation -	3		96 00	
37 " cement masonry -	5		185 00	
8,000 ft. b. m. timber and plank in work	30		240 00	
4,600 " plank for *crossings*	20		92 00	
1,400 cross ties in track - -		40	560 00	
1,500 " delivered - -		35	525 00	
1 mile track laying - -	3	75	375 00	
				9,186 79
Sec. N. 2.				
11 acres clearing - - -	25		275 00	
33 chains grubbing - -	10		330 00	
25,900 cub. yds. earth exc. - -		20	5,180 00	
170 " " " in cul. pits -		20	34 00	
3,585 " stone foundation	3		167 55	
1,225 " dry masonry -	4		49 00	
3,725 " cement - -	5		186 25	
13,032 ft. b. m. timber and plank in work	30		390 96	
778 cross ties in track - -		40	311 20	
102 " d'livered - -		35	35 70	
0,5 miles track laying - -	3	75	187 56	
				7,087 16
Sec. No. 3.				
20 acres clearing - - -	25		500 00	
37 chains grubbing - -	10		370 00	
61,700 cub. yds. earth exc. - -		20	12,340 00	
400 " " " in cul. pits		20	80 00	
3,433 " stone foundation	3		102 99	
8,726 " dry masonry -	4		349 04	
561 " protection wall -	2	50	1,402 50	
21,678 ft. b. m. timber and plank in work	30		650 34	

668	" " d'lvd -	$25	16 70	
10,000	" plank for crossings	25	250 00	
3,100	cross ties in track - -	40	1,240 00	
189	miles track laying - -	3 75	708 75	
28¼	lbs. T wr't iron - -	13	3 67	
				18,013 99
	Sec. No. 4.			
10	acres clearing - - -	25	250 00	
12	chains grubbing - -	10	120 00	
24,300	cub. yds. earth exc. - -	20	4,860 00	
18,000	ft. b. m. timber in work -	30	540 00	
3,000	cross ties in track - -	40	1,200 00	
370	" dlv'd - -	35	129 50	
189	miles track laying - -	3 75	708 75	
250	fet. b. m. plank in crossings	25	6 25	
				7,814 50
	Sec. No. 5.			
9	acres clearing - - -	25	225 00	
12	chains grubbing - -	10	120 00	
23,000	cub. yds. earth exc. - -	20	4,600 00	
23,000	ft. b. m. timber in work -	30	690 00	
540	cross ties in track - -	40	216 00	
3,550	" delivered - -	35	1,242 50	
0,3	miles track laying - -	3 75	112 50	
				7,206 00
	Sec. No. 6.			
4	acres clearing - - -	25	100 00	
10	chains grubbing - -	10	100 00	
28,000	cub. yds. earth exc. - -	20	5,000 00	
25,720	ft. b. m. timber in work -	30	771 60	
551	lin. ft. piles d'lvered -	35	192 85	
4,200	cross ties - - - -	35	1,470 00	
80	rods fence - - -	1 25	100 00	
				7,734 45
	Sec. No. 7.			
55	acres clearing - - -	25	137 50	
26	chains grubbing - -	10	260 00	
12,850	cub. yds. earth exc. - -	20	2,570 00	
4,920	ft. b. m. timber and plank in work	30	147 60	
7,600	" " framed -	25	190 00	
500	lin. ft. piles de'vd - -	35	175 00	
40	rods fence - - -	1 25	50 00	
2,200	cross ties - - - -	35	770 00	
				4,300 10

Sec. No. 8.				
3 acres clearing - - -	$25		75 00	
3 chains grubbing - -	10		30 00	
16,902 cub. yds. earth exc. - -		20	3,380 40	
3,000 ft. b. m. timber in work -	30		90 00	
7,500 " " framed -	25		187 50	
599 rods fence - - -	1	25	748 75	
50 cross ties - - - -		35	17 50	
				4,529 15
Sec. No. 9.				
3,970 cub. yds. earth exc. - -		20	794 00	
9,650 ft. b. m. timber framed -	25		241 25	
1,600 " " delivered	20		32 00	
903 rods fence - - -	1	25	1,128 75	
84 cross ties - - - -		35	29 40	
				2,225 40
Sec. No. 10.				
8,283 cub. yds. earth exc. - -		20	1,656 60	
4,100 ft. b. m. timber framed -	25		102 50	
2,900 " " and plank dlv'd	20		58 00	
270 cross ties - - - -		35	94 50	
				1,911 60

Plaintiffs also produced a copy of the December estimate of the work in 1854, when defendants surrendered the work to Farnam et al., and offered to read therefrom the estimates of the items upon the said ten sections named in said contracts given in evidence by plaintiffs. To this defendants objected, but not on the ground of the order in which it was offered. The court overruled the objections, [the same facts and circumstances attending this as the last one offered and admitted for the same reason,] and admitted that part of the estimate to be read, and defendants excepted. The part of that estimate thus read was as follows:

PEORIA AND BUREAN VALLEY RAILROAD.

Estimate December, 1854.

	Sec. No. 1.			
8	acres clearing - - -	25	200 00	
27	chains grubbing - -	10	270 00	
28,820	cub. yds. earth exc. - -	20	5,764 00	
8,611	" stone foundation	3	258 33	
5,900	" dry masonry -	4	236 00	
14,530	" cement " -	5	726 50	
7,992	ft. b. m. timber and plank in work	30	239 76	
480	" " " delivered -	25	12 00	
4,026	cross ties in track - -	40	1,610 40	
668	" delivered - -	35	233 80	
204	miles track laid - -	3 75	765 00	
250	cub. yds. ballast - -	25	62 50	
13,545	ft. b. m. plank in crossings	25	338 63	
1	cattle guard - - -	27	27 00	
100	lbs. spike - - -	13	13 00	
				10,756 92
	Sec. No. 2.			
11	acres clearing - - -	$25	275 00	
33	chains grubbing - -	10	330 00	
26,070	cub. yds. earth exc. - -	20	5,214 00	
3,585	" stone foundation	3	107 55	
3,725	" cement " -	5	186 25	
1,225	" dry masonry -	4	49 00	
13,144	ft. b. m. timber and plank in work	30	394 32	
3,907	cross ties in track - -	40	1,562 80	
189	miles track laid - -	3 75	708 75	
12	lbs. spike - - -	13	1 56	
770	ft. b. m. plank in crossings	25	19 25	
				8,848 48
	Sec. No. 3.			
20	acres clearing - - -	25	500 00	
37	chains grubbing - -	10	370 00	
62,300	cub. yds. earth exc. - -	20	12,460 00	
3,433	" stone foundation	3	103 00	
8,726	" dry masonry -	4	349 04	
76,520	" protection wall -	2 50	1,913 00	
17,640	ft. b. m. timber and plank in work	30	529 20	
984	" " " d'lvd -	25	24 60	
	Repairing stone culvert -	–	27 00	

3,859 cross ties in track - -		40	1,543 60	
53 lbs. iron and spike - -		13	6 89	
189 miles track laid - -	3	75	708 75	
1,642 ft. b. m. plank in crossings	25		41 05	
6 cattle-guards - - -	27		162 00	
				18,738 13
Sec. No. 4.				
10 acres clearing - - -	25		250 00	
12 chains grubbing - -	10		120 00	
24,300 cub. yds. earth exc. - -		20	4,860 00	
14,670 ft. b. m. timber and plank in work	30		440 10	
90 lbs. iron and spike - -		13	11 70	
3,889 cross ties in track - -		40	1,555 60	
189 miles track laid - -	3	75	708 75	
1,226 ft. b. m. plank in crossings	25		30 65	
4 cattle-guards - - -	27		108 00	
				8,084 80
Sec. No. 5.				
9 acres clearing - - -	25		225 00	
12 chains grubbing - -	10		120 00	
23,098 cub. yds. earth exc. - -		20	4,619 60	
22,300 ft. b. m. timber and plank in work	30		669 00	
154 lbs. iron and spike - -		13	20 02	
3,814 cross ties in track - -		40	1,525 60	
189 miles track laid - -	3	75	708 75	
1,300 ft. b. m. plank in crossings	25		32 50	
2 cattle-guards - - -	27		54 00	
				7,974 47
Sec. No. 6.				
4 acres clearing - - -	25		100 00	
10 chains grubbing - -	10		100 00	
25,020 cub. yds. earth exc. - -		20	5,004 00	
25,260 ft. b. m. timber and plank in work	30		757 80	
746 " " delivered -	25		18 65	
551 l. ft. piles dli'red - -		35	192 85	
388 lbs. wro't iron and spike -		13	50 44	
110 " cast iron - - -		6	6 60	
4,117 cross ties in track - -		40	1,646 80	
470 " delivered - -		35	164 50	
206 miles track laid - -	3	75	772 50	
3 cattle-guards - - -	27		81 00	
2,439 ft. b. m. plank in crossings	25		60 97	
				8,956 11

Sec. No. 7.				
550 acres clearing - - -	$25		137 50	
26 chains grubbing - -	10		260 00	
17,353 cub. yds. earth exc. - -		20	3,470 60	
10,544 ft. b. m. timber and plank in work	30		316 32	
500 lin. ft. piles de'vd - -		35	175 00	
3,468 cross ties in track - -		40	1,387 20	
170 miles track laid - -	3	75	637 50	
4 cattle-guards - - -	27		108 00	
2,217 ft. b. m. plank in crossings	25		55 42	
164 lbs. wro't iron spikes -		13	21 32	
				6,568 86
Sec. No. 8.				
3 acres clearing - - -	25		75 00	
3 chains grubbing - -	10		30 00	
19,959 cub. yds. earth exc. - -		20	3,991 80	
12,620 ft. b. m. timber and plank in work	30		378 60	
599 rods fence (Osage, Osage)	1	25	748 75	
4,322 cross ties in track - -		40	1,728 80	
208 miles track laying - -	3	75	780 00	
2 cattle-guards - - -	27		54 00	
1,497 ft. b. m. plank in crossings	25		37 42	
408 fence posts - - -		15	61 20	
31 lbs. spike - - -		13	4 03	
				7,889 60
Sec. No. 9.				
4,419 cub. yds. earth exc. - -		20	883 80	
12,390 ft. b. m. timber and plank in work	30		371 70	
903 rods fence, (Osage, Osage)	1	25	1,128 75	
3,774 cross ties in track - -		40	1,509 60	
318 do delivered - -		35	111 30	
189 miles track laid - -	3	75	708 75	
2 cattle-guards - - -	27		54 00	
1,099 ft. b. m. plank in crossings	25		27 47	
8 lbs. spike - - -		13	1 04	
				4,796 41
Sec. No. 10.				
9,366 cub. yds. earth exc. - -		20	1,873 20	
2,932 ft. b. m. timber and plank in work	30		87 96	
729 do do d'lvd -		25	18 23	
4,279 cross ties in track - -		40	1,711 60	
" do delivered - -		35	3 85	

213 miles track laid - -	$3 75	798 75	
2,945 ft. b. m. plank in crossings	25	73 62	
4 cattle-guards - - -	27	108 00	
35 lbs. spike - - -	13	4 55	
336 fence posts - - -	15	50 40	
			4,730 16

After plaintiffs had read the aforesaid December estimate, and closed their testimony, again defendants *again* offered to read the foregoing contract with Farnam and others, but the court excluded the same, and defendants excepted.

In the progress of the trial, the following questions became material:

1st. *Whether* under the first contract read in evidence by the plaintiffs, as above set out, dated Sept. 6th, 1853, plaintiffs were to have $25 per thousand feet, board measure, for timber and plank, by merely *furnishing* and *delivering* the same at the place to be used; or whether plaintiffs were to receive the $25 per thousand as a full consideration for not only furnishing and delivering the timber, but were bound for the same consideration to put the timber into the work by framing and putting it together in culverts, called guards, &c. The court held that by said contract, plaintiffs were required merely to furnish and deliver said timber and plank, and were not required to put it into the work at all; and defendants excepted to this decision?

2nd. Evidence having been given tending to show that the grubbing on the whole work amounted to 190 chains, of which 139 chains were grubbed before the first of February, 1853, and 21 chains were grubbed after the first of March by plaintiffs; and that when they quit the work there remained to be grubbed 30 chains, defendants insisted that by the provisions of the new contract of date of 28th Feb., 1854, altho' the price of the whole of the grubbing was raised, yet so far as concerned the monthly payments on the grubbing already done, the defendants were not to pay any thing more until the whole job was completed; and that by said contract no increase was provided for the rate of the monthly estimates which had gone by; but the court held that by the terms of the said new contract, the price of the first grubbing as well as that in prospect was changed, and it became the duty of defendants, within a reasonable time after the execution of said contract of 28th of February, 1854, to pay to plaintiffs the per centage of whatever was added to the price of grubbing by the new contract; and that if defendants had neglected to make such payment, it would be lawful for plaintiffs, after demand made and refusal on the part of the defend-

ant to pay, to rescind said contract on account of that neglect; [but it did not appear a demand was made or a forfeiture was claimed on that ground.] To this ruling of the court the defendants excepted.

The court charged the jury generally upon the law of the case, and was asked by defendants to charge the jury, that if defendants in their *earlier* estimates to plaintiffs erroneously allowed them only $15 per thousand instead of $25 per thousand, and afterwards, in paying the amount mentioned in the receipt of the date of Aug. 10th, 1854, (and before plaintiffs had declared his election to rescind the contract,) they paid up the whole that was accrued on the timber at the proper rate, that after that plaintiffs could not rescind on that account.

The court refused to charge the jury in that form, but said to the jury that the mere receipt of the money would not be a waiver; but that if after the mistake was discovered, the payment *withheld* was made in full by the defendant, and with knowledge it had been withheld, and was paid as money that should have been previously paid on the part of the plaintiffs, it would be a waiver of a forfeiture of the contract.

Inasmuch as these matters are not matters of record, defendants then and there tendered this his bill of exceptions, and asked that the same might be signed and sealed by the judges, and made a part of the record, which was then and there done.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed June 3d, 1856.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 10th day of June, A. D. 1856, said defendants, by their attorneys, filed in said clerk's office their bond, in the words and figures following, to wit:

Know all men by these presents, that we, Ransom Gardner, F. B. Gardner, and Henry Farnham, the first a principal and last two as securities, are held and firmly bound unto William S. Moss, Smith Frye, and Charles Greenleaf, in the penal sum of twenty thousand dollars, for the payment of which well and truly to be made to the said William S. Moss, Smith Frye, and Charles Greenleaf, their heirs, executors and administrators, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, dated this 9th day of June, A. D. 1856. Yet upon this condition, whereas at the May adjourned term, A. D. 1856, of the circuit court of the United States for the northern district of Illinois, the said William S. Moss, Smith Frye, and Charles Greenleaf recovered lately a judgment in said circuit court of the United States against the said Ransom Gardner, George Goss, and Moses M. Jackman, for the sum of fourteen thousand four hundred and sixty-eight and 98-100 dollars, besides costs; and whereas said

Ransom Gardner, George Goss, have sued out a writ of error to the Supreme Court of the United States, to have said judgment reversed, and desire that the same may be made a supersedeas:

Now, therefore, if the said Ransom Gardner, George Goss, and Moses M. Jackman shall prosecute said writ of error with effect, and shall pay said judgment and all costs and damages which may be adjudged against them in the event that they fail to have said judgment reversed, then this obligation to be null and void, otherwise of force.

RANSOM GARDNER, [SEAL.]
By T. L. DICKEY,
his attorney in fact.
F. B. GARDNER, [SEAL.]
HENRY FARNAM. [SEAL.]

UNITED STATES CIRCUIT COURT,
N. Dist. of Ills., ss.

Isaac H. Burch, of said district, being duly sworn, deposeth and says, that he is personally acquainted with Henry Farnam, and that he, this deponent, believes said Farnam is worth the sum of twenty thousand dollars, over and above all his just debts and liabilities.

I. H. BURCH.

Subscribed and sworn to before me this 10th day of June, A. D. 1856. WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS.

F. B. Gardner, one of the sureties to the foregoing recited bond, having been duly sworn before Wm. H. Bradley, clerk of the circuit court of the United States for said district, on this tenth day of June, A. D. 1856, deposes and says, that he is worth the full sum of twenty thousand dollars, over and above all his just debts and liabilities.

F. B. GARDNER.

Sworn to and subscribed before me, this 10th day of June, A. D. 1856.

WM. H. BRADLEY, *Clerk.*

Security approved. THOMAS DRUMMOND.

Endorsed: Filed June 10th, 1856.
WM. H. BRADLEY, *Clerk.*

And on the same day, to wit, the 10th day of June, A. D. 1856, said defendants, by their attorneys, filed in said clerk's office their writ of error, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss.

The United States of America, to the judges of the Circuit Court of the United States for the Northern District of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between William S. Moss, Smith Frye, and Charles Greenleaf, against Ransom Gardner, George Goss, and Moses M. Jackman, a manifest error hath happened, to the great damage of the said Ransom Gardner, George Goss, and Moses M. Jackman, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this tenth day of June, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eighty-first year. WM. H. BRADLEY, *Clerk*.

[SEAL.]

Endorsed: Filed June 10th, 1856.
WM. H. BRADLEY, *Clerk*.

NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William A. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceedings which have been had in said court in said cause of William S. Moss, Smith Frye, and Charles Greenleaf, against Ransom Gardner, George Goss, and Moses M. Jackman, as the same now appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said northern district, this twenty-fourth day of December, A. D. 1856.

[SEAL.]

WM. H. BRADLEY, *Clerk*.